WORLD MARITIME UNIVERSITY

ENVIRONMENTAL PROTECTION SERVICES AND SALVAGE LAW: EMERGING ISSUES IN PERSPECTIVE

by

HUIRU LIU

WMU RESEARCH REPORT SERIES
No. 14, October 2020

Environmental Protection Services and Salvage Law: Emerging Issues in Perspective

WMU RESEARCH REPORT SERIES

No. 14, October 2020

The aim of the WMU Research Report Series is to publish essays, monographs, articles, policy papers, occasional papers, reports, and PhD dissertations to promote academic research and publication among resident colleagues at the World Maritime University as well as other scholars associated with it. Publications in this series will be published in moderately priced limited offset editions.

The Editors, WMU Research Report Series
World Maritime University
P.O. Box 500
201 24 Malmö
Sweden

ENVIRONMENTAL PROTECTION SERVICES AND SALVAGE LAW: EMERGING ISSUES IN PERSPECTIVE

Huiru Liu
People's Republic of China

A dissertation submitted to the World Maritime University in partial fulfillment of the requirements for the award of the degree of Doctor of Philosophy in Maritime Affairs

WMU RESEARCH REPORT SERIES
No. 14, October 2020

WMU Publications

Cover photo: World Maritime University by ©Maximo Q. Mejia Jr.

ISBN: 978-91-985700-2-1

DOI: 10.1555/phd20191010b

Published in Sweden in 2020 by

WMU PUBLICATIONS
PO Box 500
201 24 Malmö, Sweden

Suggested Citation:
Liu H (2020). *Environmental Protection Services and Salvage Law: Emerging Issues in Perspective*. WMU Publications: Malmö, Sweden.

Table of Contents

Acknowledgement

Having reached the final port of destination of this eventful and arduous voyage, the culmination of my research endeavour, I wish to express my sincere and heartfelt gratitude to my supervisor Professor Carolina Romero for her unflinching guidance and direction during the entire period of my research and the writing of this thesis. Her opinions and advice prior to each progression seminar helped me immensely to build up confidence and perform satisfactorily. I owe a debt of gratitude to Professor Max Mejia, Director of the WMU Ph.D. Programme for his constant and unreserved academic oversight, and to the members of the progression boards for their constructive comments. Most of all, I wish to thank Carla Escalante-Fischer for her relentless administrative support, professional assistance and personal friendship throughout the duration of my research. I will always appreciate her concern and kindness during my difficult times. I also wish to thank the WMU Librarians Chris Hoebeke and former Assistant Librarian Anna Volkova for always being available whenever I needed their help. I will remember my Ph.D. colleagues, Dr. Adriana Nordfjeld, Ali Al-Naseri, Agus Mardaly, Bryan Buxton-Barnor, Evangelos Darousos, and especially Dr. Tafsir Johansson, for their camaraderie and for always being there for me.

There are many who have assisted me along the path towards reaching the finality of my research; to all of them, I extend my thanks unhesitatingly. Among them, I would wish to recognize the guidance and advice given by Mr. Van de Boer, IMO Legal Officer, Mr. Jose Maura, former President of the International Oil Pollution Compensation Funds and Ms Kiran Khosla, Legal Counsel for the International Chamber of Shipping. I gratefully acknowledge the valuable suggestions given by Mr. Mark Hoddinott, former General Manager of the International Salvage Union and Mr. Archie Bishop, former senior partner of Holman, Fenwick and Willan regarding my research. I owe a debt of gratitude to Professor Martin Stopford who encouraged me to pursue my topic when he was my lecturer at the International Foundation of the Law of the Sea (IFLOS) Academy in 2016. He introduced me to the Tsavliris Salvage Company from where I acquired valuable background materials at the early stage of my research.

In undertaking this monumental task, I was deeply inspired by Professor Proshanto K. Mukherjee, former Vice President (Research) of WMU and presently Professor of Law and Foreign Expert at Dalian Maritime University where I completed my LL.B. and LL.M. I was fortunate enough to attend Professor Mukherjee's lectures and be guided by him in the IMLAM Moot court competition during my LL.M. studies. I was overwhelmed by his experience and knowledge of maritime law and his scholarly care for students. I am profoundly grateful to him as sponsor of the Juthika Memorial Charitable Trust, the provider of my Ph.D. Fellowship and as my life-time mentor.

Last, but not least, my sincerest thanks go to my family - my father, Zuoyong Liu, mother, Shengqin Wu, brother, Kai Liu, sister-in-law, Feng Zhang. Without their silent and patient support, understanding and blessings, I would not have been able to achieve my goal, and of course, my little nephew Haosong Liu who brought me so much happiness as I ventured through this long journey.

Abstract

This dissertation primarily concerns the law and practice of salvage focusing on its environmental dimension which started to evolve since the Torrey Canyon disaster in 1967, which until that time, was the biggest oil spill in maritime history. In the contemporary era of shipping, a major part of salvorial operations has shifted from property preservation to environmental protection. This dissertation centers on the services provided by salvors to prevent or mitigate damage to the environment. This phenomenon is generally referred to as "environmental salvage" which, it is submitted, is an anomaly and a misnomer. It is therefore proposed that the term "environmental protection services" provided by salvors is a better and more appropriate description. The central purpose of this inquiry is to examine this phenomenon, identify the contentious issues involved, and seek a rational solution recognizing the legal and commercial implications.

The discussion essentially embraces two maritime law subject matters, namely, the law of salvage including the customary salvage law and the International Convention on Salvage, 1989 and the private law of ship-source pollution. The roots of customary salvage law lie in a zone of confluence comprising the Roman law on the one hand and the principle of equity emanating from Chancery in English law, on the other. While traditional salvage law is steeped in antiquity, the marine environment was not much of a concern until the advent of oil tankers, and therefore until relatively recent times, there was no legal regime governing ship-source pollution. Law reform took place in the 1980s to encourage salvors to provide environmental protection services. This included the introduction of the so-called "safety net" in the Lloyd's Open Form (LOF) 1980 and subsequently, the special compensation regime provided in Article 14 of the Salvage Convention, 1989. The international salvage community was greatly dismayed and disenchanted with the decision of the House of Lords in the Nagasaki Spirit case in 1997. The apex court held that the term "fair rate" in respect of payments made for equipment and personal in Article 14.3 of the Convention did not include an element of profit. The upshot of that decision was the creation of the SCOPIC Clause as an optional addendum to the LOF to remunerate salvors on a tariff base for their environmental efforts.

In recent times, salvors have expressed their dissatisfaction with the extant scheme of remuneration including Article 14 and SCOPIC and have proposed that a separate "environmental award" be established in the Convention. Shipowners, together with their liability insurers the P&I Clubs, are staunchly opposed to this proposal and are of the view that the status quo should be maintained. This has led to an undesirable impasse. The debate rages on and there is little sign of any compromise being reached between the two camps. In practical terms, the issue of indemnifiability of charges incurred for environmental protection services is not to be ignored. In that context, it would seem that liability insurers have the upper hand

since they are the ones who indemnify the shipowners for such charges and therefore have the final say on the feasibility of the proposal made by salvors.

The main object of this research endeavour is to seek an alternative solution to ameliorate the conflict between the extreme positions adopted by the two opposing camps for the benefit of the shipping industry as a whole. In ship-source pollution incidents, salvors are invariably the first and most important responders. In the course of providing environmental protection services, they are vulnerable to being subjected to pollution liability. Inspired by the United States Oil Pollution Act 1990, and the proceedings and outcomes relating to the Deepwater Horizon incident, it is proposed that the concept of responder immunity be put forward as a possible compromise solution to break the current deadlock. It may serve as an incentive to salvors and persuade them to withdraw their demand for a separate environmental award. In articulating that proposal, the author examines the channeling provisions in the Civil Liability and HNS Conventions which purport to protect salvors, among other responders, from liability suits initiated by third-parties. It is submitted that salvors do not actually enjoy any responder immunity under those provisions because under the conventions, shipowners can bring recourse actions against them.

In conclusion, it is proposed that the international community consider following the national legislative models in jurisdictions such as the United States and the United Kingdom which exemplify how these conventions should be implemented to provide responder immunity to salvors and thus resolve the contentious issues between the two camps. In this endeavour, the International Maritime Organization (IMO) can adopt a more robust approach to responder immunity which will inure to the benefit of all parties concerned. No doubt, international shipping as a whole will be placed on a better footing with regard to provision of environmental protection services by salvors.

Keywords: Environmental Protection Services, Lloyd's Open Form, Salvage Convention 1989, SCOPIC, Responder Immunity, Channeling Provisions, Recourse Actions**.**

Part I
– Preliminaries

1. Introduction

1.1. Background

In the last several decades, the rapid increase in tanker traffic worldwide has inflicted on the marine environment a serious threat and given to the salvor a new disposition in the maritime domain, the monumental task of preventing or mitigating ship-source pollution. It is alleged, however, in certain quarters of the shipping world, that the extant legal regime of salvage fails to adequately recognize the needs and exigencies of the salvage industry. In traditional salvage law, salvors were only remunerated for saving maritime property successfully and voluntarily in the face of danger. The marine environment and ship-source pollution was of little concern until the grounding in 1967 of the Liberian tanker *Torrey Canyon* on Seven Stones Reef off the western shores of the United Kingdom. The consequence was a catastrophic oil spill of unprecedented proportions hitherto inconceivable. It was a rude awakening for the entire maritime world which left the coastal community of pollution victims helpless, the tanker and oil industries bewildered and the legal and techno-scientific fraternities clueless, thankfully, not for too long. The British Government caused the vessel to be sunk in the high seas for fear of uncontrollable pollution.

Significant ship-source pollution disasters in subsequent years up to the present times include the *Amoco Cadiz*, the *Exxon Valdez*, the *Haven*, the *Nagasaki Spirit*, the *Aegean Sea*, the *Braer*, the *Sea Empress*, the *Erika*, the *Prestige*, the *Mont Louis*, the *Grandcamp* and the *Ariadne.* The urgent need to protect the marine environment from shipping activity has understandably become a growing concern for every vulnerable coastal country.

Salvors, proceeding to the aid of a leaking tanker frequently failed to earn a reward under extant rules of salvage law in cases where the vessel was destroyed at the behest of officialdom. The harshness of the “no cure no pay” rule under which the legal requirement for “ultimate preservation of the *res*” had to be met, prevented salvors from earning a reward. There was no respite for the salvor because the salved value of the polluting vessel was depleted or reduced to zero such as in cases like the *Kurdistan,* the *Atlantic Empress* and the *Prestige.* This malaise of maritime leprosy and its dire commercial consequences drove salvors away from leaking tankers. The time had arrived for the rigorous “no cure no pay” principle to take

account of the changing milieu of salvage in the face of escalating concerns over pollution damage and their rising legal and practical implications.

Whether or not salvors should be entitled to any privileges beyond what has traditionally been granted rationalized by practical and commercial considerations of pollution damage is rooted in the notion of "enhancement of awards" within the boundaries of "no cure no pay" which had already been advanced through the English case law. The prime example of the entrenchment of enhancement of awards is the life salvage which hitherto under the traditional law of salvage was not considered to be payable unless something other than life had been saved by the salvor. Essentially this was ship, cargo and other property of the shipowner. A salvage fund had to be constituted the amount of which was based on the value of the property saved. Life salvage could only be paid out of such fund. The enhanced award concept exemplified by life salvage provided the rationale and legal basis on which payment to the salvor for preventing or mitigating pollution damage could be established, but only where property was also successfully salved.

The application of "no cure no pay" entrenched in Lloyd Open Form (LOF) coupled with the requirement for "ultimate preservation of the *res*" threatened the survival of the salvage industry in the face of major oil spill cases. Granted these are long-standing principles of traditional salvage law and practice codified in the Salvage Conventions of 1910 and 1989, recent developments have spurred the need for law reform in this area. In this regard, two parallel developments occurred, one through the mechanism of the LOF and the other through convention law.

The Committee of Lloyd's first reacted in 1979 when it set up a Working Party to update the existing version of LOF to deal with the dilemma. The Working Party proposed the concept of liability salvage, but it was fiercely rejected by the P&I Clubs who introduced the "safety net" proposal which was eventually incorporated into the new LOF 1980 as a salient feature. This version of the LOF required the salvor "to use his best endeavours to prevent the escape of oil from the vessel". In conjunction with this requirement, under the so-called "safety net" provision, the salvor would receive an amount by way of compensation comprising his expenses together with an increment regardless of whether or not property had been saved provided he succeeded in preventing or mitigating pollution damage. However, only expenses reasonably incurred by the salvor were compensable. The safety net device was considered a major deviation from the "no cure no pay" principle. In furthering this new concept in practice, the Hull and Machinery (H&M) insurers and P&I Clubs reached a Funding Agreement to distribute the financial burden, with the former undertaking to pay the traditional salvage award including the enhancement and the latter bearing the cost of the safety net.

Simultaneously, the International Maritime Organization (IMO) launched a review of the Salvage Convention, 1910 with the aim of adopting a new convention

reflecting growing global concerns over ship-source pollution and articulating a regime recognizing the environmental dimension of salvage. At the behest of IMO, the Comité Maritime International (CMI) produced a draft salvage convention. Following its Montreal Conference in 1981, the CMI submitted the draft to IMO in 1984 to be included in the deliberations of the Legal Committee. After some protracted debate and discussion, the International Convention on Salvage, 1989 was finally adopted and entered into force in 1996. In the new convention, the notion of the safety net was subsumed and transformed into the widely acclaimed special compensation regime in its Article 14, the customary salvage awards for saving of maritime property being addressed through Article 13. These two Articles operate in conjunction with each other in salvage cases involving ship-source pollution.

Not long after the new Salvage Convention entered into force, the container ship *Ocean Blessing* and the tanker *Nagasaki Spirit* collided in the northern part of the Malacca Strait. The *Ocean Blessing* sank with the loss of all hands on board; the *Nagasaki Spirit* caught fire and caused severe pollution damage. Semco Salvage tugs out of Singapore towed the *Nagasaki Spirit* into port for repairs following which the remaining cargo was transshipped on to the *Pacific Diamond.* The vessel was eventually handed over to its owners in Belawan, Indonesia. The litigation which followed went through two levels of arbitration and three levels of judicial proceedings culminating in the House of Lords. *The Nagasaki Spirit*[1] is undoubtedly of utmost importance in the context of environmental protection services provided by salvors which is the theme of this thesis. In this case, the House of Lords held that "fair rate for equipment and personnel" in Article 14, paragraph 3 of the Convention did not include a profit element. Most conspicuously, Lord Mustill stated in reference to the Salvage Convention, 1989 that "…the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage…".[2] The judgment instigated and brought to the forefront several controversies centering on the special compensation regime including problems of interpretation of Article 14 of the Convention and practical considerations in the assessment of salvage awards.

The judicial view clashed with industry practice leaving all major players in the shipping field dissatisfied in the realization that a harmonious approach to differences was needed. Industry interests circumvented the court decision and Article 14 of the Convention by resorting to a contractual mechanism in the form of the Special Compensation P&I Club (SCOPIC) Clause as an optional addendum to the LOF to replace Article 14 if incorporated and invoked. Since property

[1] *Semco Salvage & Marine Pte Ltd*. v. *Lancer Navigation Co. Ltd.,* [1995] 2 Lloyd's Rep. 44; [1996] 1 Lloyd's Rep. 449 (C.A.); [1997] 1 Lloyd's Rep. 323 (H.L.).

[2] It is argued in this thesis that the term "environmental salvage" is inappropriate; instead the term environmental protection services is used. See Chapter 8.

underwriters and P&I insurers are not parties to the LOF or SCOPIC, to align themselves with SCOPIC, they reached two Codes of Practice concerning financial apportionment which are not legally binding but operate as "gentlemen's agreements".

SCOPIC has, through its security and tariff provisions, ameliorated to a considerable degree, the problem of assessment engendered by Article 14. Nevertheless, it is argued by some that neither the safety net, nor the special compensation regime nor SCOPIC are adequate mechanisms for rewarding salvors for protecting the marine environment from pollution damage. It is their contention that these devices simply provide compensation to cover the reasonable expenses incurred by salvors; they do not constitute remuneration or reward for their "best endeavours".

Salvors still contend that their woes have not come to an end. Their view is that there is still considerable room for improvement of their lot. In recent years, the International Salvage Union (ISU) has proposed that a new regime be introduced providing a separate award to salvors for preventing or mitigating pollution damage. The ISU position is that the present system under the Salvage Convention, 1989 and the commercial arrangement of the LOF even together with SCOPIC, do not reflect an adequate appreciation of the efforts expended in the discharge of salvorial duties under the Convention or the LOF in averting or minimizing environmental damage. Of course, the proposal is not without its opponents. Shipowners and their third-party liability insurers (P&I Clubs) seem to be vehemently opposed to it. On the other hand, property underwriters recognize a need for law reform but do not fully support the ISU approach.

The ISU first raised the issue with the Lloyds Form Salvage Group which later established a sub-committee. Several meetings of it took place between 2007 and 2008 to deliberate on the issue. Unfortunately, no unanimity was reached. The ISU then approached the CMI which established an International Working Group (IWG) to examine the proposition. The IWG distributed two rounds of questionnaires to solicit the views of 56 National Maritime Law Associations (NMLA). The proposal was eventually tabled and discussed at the 40th Conference of the CMI held in Beijing in October 2012, but failed to attract sufficient support. Understandably, the ISU is disappointed but has continued its quest for a system of stand-alone environmental salvage awards through other alternative approaches.

To put it in summary, the legal implications of environmental protection services provided by salvors as it exists in the contemporary milieu of salvage law and practice emanates from Article 14 of the Salvage Convention 1989 which in turn is based on the notion of the safety net advanced through the LOF 1980. In reaction to the unpopular decision in *The Nagasaki Spirit* case, the SCOPIC clause was created as an optional addendum to the LOF. The concept of an "environmental award" as promoted by the ISU has not received widespread recognition, but is still being

pursued by its protagonists and is in the process of evolution. Whether it will gain universal acceptance remains to be seen, but the controversy has provided this author the impetus for this work.

1.2. Premise

This thesis is primarily concerned with salvage albeit specifically about the implications of its environmental dimension in the present milieu. But it is recognized that salvage law is old law going back millennia whereas the law of ship-source pollution is relatively new. Marine insurance which concerns indemnification of salvage charges incurred by an assured shipowner is also old law, its progenitors being lost in antiquity. Against this crude backdrop, it must be stated at the outset that while acknowledging the role of international convention law as and where relevant, this thesis is predominantly centred on the English law perceptions of the subject and is unavoidably heavily case-law based. One rationale for flagging this approach in the thesis is that long before the international law of salvage was seemingly codified for the first time through the Brussels Convention of 1910 through the efforts of the CMI, there was already a wealth of salvage jurisprudence engendered through the English case law. In view of the fact that the United States is as much a common law jurisdiction as England, where English law has been tempered or influenced by American decisions, references have been made to those cases as found to be appropriate.

1.3. Purpose

Against the above background, the central purpose of this thesis is to probe into the disagreements raging between shipowners and the salvage industry regarding the adequacy of payments made to salvors for providing environmental protection services. In view of the controversy posing an undesirable impediment to the smoothness of global shipping activities, the ultimate goal is to propose an amenable legal solution. At this early juncture, it is postulated that for reasons that will come to light as the thesis unfolds, this author prefers to use the term “environmental protection services” as opposed to “environmental salvage”. It is recognized, however, that “environmental salvage” as jargon has gained considerable familiarity within the maritime community at large which makes its use at times unavoidable. As gleaned from the above, a two-fold target of investigation is contemplated; namely, (1) the feasibility of a separate regime for an environmental award as

proposed by the salvage industry; and (2) consideration of an alternative approach to reconcile the differences between the shipping and salvage industries.

There are three constituent areas of law associated with the central purpose; namely, the law of salvage, the private law of ship-source pollution and the law of marine insurance in connection with salvage charges, in that order. Viewed in this expanded light, the aforementioned central purpose would encompass a thorough investigation into the evolution and state of the extant law of salvage including the legal implications of salvors providing environmental protection services. This would entail a detailed discussion on the environmental dimension of salvage and the evolution of the law in that field up to the *status quo*. It would also include a detailed examination of the corresponding law of ship-source pollution liability pertaining to such services and compensation for pollution damage as set out in the relevant conventions, the decided cases in different jurisdictions and the so-called "Fund jurisprudence". Compensability in respect of environmental damage and economic losses will be examined in this context. Associated with both these lines of investigation, the issue of indemnification of salvage charges by property insurers (H&M and cargo) and third-party liability insurers (P&I Clubs) in relation to environmental protection services would need to be examined as well.

The author intends to probe into the relevant issues objectively and analytically by looking at the overall benefits accruing to international shipping and the advancement of global maritime commerce in light of the environmental dimension of salvage law. This particular area of maritime law endeavour is still at an embryonic state although the law of maritime salvage, which represents the core of the research topic is as old as shipping itself going back in history at least to Roman times and evidently further back to the Rhodian Sea Law dated approximately 800 B.C. By contrast, another prong of the research topic, namely, the law of liability and compensation for ship-source pollution damage, is relatively new dating back only to 1967, the year of the *Torrey Canyon* disaster. The third prong of the investigation, namely, indemnification of salvage charges incurred by the shipowner in respect of environmental protection services provided by salvors falls under the law of marine insurance which has its origins further back in time from the Roman law to the antiquated legal and commercial concepts of bottomry and r*espondentia* of a primitive era in legal history.[3] It is expected that the end product of the research effort reflected in this thesis, will assist in the formulation of future international maritime law and policy in a meaningful way. The author espouses the view that in order to thoroughly appreciate the present (*de lege lata*), a clear understanding of

[3] References to these are found in the ancient Babylonian Code of Hammurabi and the *Manu Sanghita* or *Samhita* ("Laws of Manu" or "lawbook of mankind" in English). See Edgar Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, Toronto: Lexington Books, 1981, at p. 2; James Reddie, *Historical View of the Law of Maritime Commerce*, William Blackwood & Sons, Edinburgh & London, at pp. 492-493.

the past is necessary which together points to what is best for the future (*de lege ferenda*).

1.4. Research Parameters

At the 40th Conference of the CMI held in Beijing in 2012 there was a lack of adequate support for the ISU proposal for an independent environmental award. Since then, there has been no visible movement from either camp in the debate. The proposed research is therefore a timely initiative which will hopefully contribute substantially to current efforts being expended under the aegis of the CMI by concerned parties towards achieving a balanced and satisfactory resolution to this very topical problem. At any rate, reform in this area of law, whatever shape or form it takes, will doubtless be a long and tedious process and controversy may continue to rage. Nevertheless, regardless of whatever eventuality occurs in the realm of environmental protection services provided by salvors, the author is hopeful that this research initiative will be a valuable contribution towards it.

Further to the anticipations expressed above, specific research questions addressed in the thesis include the following:

1) What is the notion of environmental protection services provided by salvors and how do such services relate to ship-source pollution damage?
2) What, if any, is the rationale for proposing a separate legal regime for an environmental award as against maintaining the *status quo*?
3) What are the positions taken by shipowners, salvors and insurers and what are their arguments in support of their respective positions?
4) What is the legal position regarding indemnifiability of salvage charges incurred in respect of payments made to salvors for environmental protection services?
5) What is the likelihood that full responder immunity granted to salvors for providing environmental protection services will meet the needs of all parties concerned?

Notably, all private maritime law issues have commercial implications which are inevitably important to this thesis. To put it another way, in the final analysis, the law translates into a balancing or re-balancing of financial gains and detriments among and between entities engaged in shipping ventures, for example the carrier-shipper relationship and the shipowner-charterer relationship in carriage law. However, the author has no intention to extend this thesis to any quantitative commercial or economic analysis regarding environmental protection services provided by salvors but simply to explore the viabilities of a comprehensive legal regime for such services.

Even so, industry viewpoints towards the concept of environmental protection services provided by salvors must be taken into consideration. The industry opinions are understandably subjective reflecting the interests and perspectives of the entities concerned. But they do represent the essence of the debate surrounding the phenomenon of environmental protection services. There is good reason, therefore, to critically examine the position taken by the salvage industry with respect to the present scheme of salvage awards and the proposal for law reform spearheaded by the ISU together with the positions taken by shipowners, property insurers and liability insurers. Through explanations of the rationale behind the assertions of concerned sectors, and in contemplation of the establishment of a new separate regime, speculative conclusions may be made on the ensuing legal implications for indemnification.

1.5. Structure

The thesis is divided into four Parts. Part I contains the "Preliminaries". Parts II are captioned "Salvage and Ship-Source Pollution" and PART III concentrates on "Salvors' Remuneration for Provision of Environmental Protection Services". Part IV addresses another angle of salvage law, "Salvors' Liability and Immunity" and at last, Part V is the "Conclusion".

Following this first chapter setting out the background, purpose and structure of the thesis, Chapter 2 will provide a contextually thorough and clear presentation of legal theory in general and that pertaining to the three constituent themes of the research topic; namely, the law of liability and compensation for ship-source pollution damage, salvage law and the related matter of indemnifiability of salvage charges through the law of marine insurance, in particular. The legal research methodologies intended to be employed in this research endeavour will be discussed in relative detail.

Chapter 3 is intended to provide an overview of salvage law as a maritime saving act, focusing on the theoretical underpinnings of the customary law of salvage. The chapter will examine the historical evolution of salvage law and its underlying principles in terms of legal theory, which invariably will lead to a discussion of the "triumvirate" of danger, voluntariness and success; namely, the essential ingredients of traditional salvage law. The features of the modern salvage law principally governed by the Salvage Conventions will then be introduced.

Chapter 4 will present in contextual detail the private law of ship-source pollution which is intertwined with the law of salvage. The genesis of ship-source pollution law, the *Torrey Canyon* disaster of 1967 which aroused global marine environmental consciousness and implications for the salvage industry, will be

addressed. Notably, the governing convention regime and also the non-convention tort law regimes mainly under common law operating in countries not party to the conventions will be discussed in relation to liability and indemnifiability of ship-source pollution damage elaborated by reference to several pollution cases. In terms of connectivity with salvage, compensation to salvors based on alternative rights under international convention regimes governing civil liability for ship-source pollution will be explained.

Chapter 5 captioned "Environmental Dimension of Salvage: Law Reform in Motion" will investigate the origins of environmental protection services as a concept which is historically rooted in the notion of "enhanced awards" in salvage law relating to, *inter alia*, life salvage and risk of liability for wreck removal and collision exemplified by cases such as *The Whippingham*[4] and *The Gregerso*.[5] Also, the concept of liability salvage, the understanding of which is germane to the present theme, will be addressed. The discussion will extend naturally to the negative impact on the salvage industry stemming from the "no cure no pay" principle and the legal requirement for "ultimate preservation of the *res*" in oil spill incidents such as the *Christos Bitas*, *Atlantic Empress* and *Amoco Cadiz* among others. The evolution of the safety net concept of LOF and the contemporaneous development of the Salvage Convention, 1989 to provide respite to salvors in cases involving damage to the environment, will be discussed to point to the extant outcome of law reform in salvage. Incidentally, this chapter will also analyze and critique the case law jurisprudence on salvage remuneration involving ship-source pollution incidents, in particular *The Nagasaki Spirit*.

In Chapter 6, the episode of the *Nagasaki Spirit* case will be discussed in great detail including the arbitral awards and the decisions at the three levels of courts culminating in Lord Mustill's judgment in the House of Lords. A critical analysis of this case will be presented as it marks a turning point in the legal regime pertaining to environmental protection services. As a result of dissatisfaction with the decision, the whole industry opted for a non-judicial resolution of the matter through the contractual route facilitated by Lloyds Open Form of Salvage (LOF) Agreement. This resulted in the creation of the Special Compensation P&I Club Clause (SCOPIC).

Chapter 7, it is expected, will provide is a "blow by blow" analytical presentation of SCOPIC including its major sub-clauses and changes made over the years of its existence, which incidentally, is very much the current vehicle through which payment to salvors for provision of environmental protection services is dealt with in most jurisdictions around the world.

---

[4] (1934), 48 Ll.L.R. 49.

[5] [1971] 2 Lloyd's Rep. 220.

Chapter 8 bears the title "Environmental Protection Services: The Phenomenon and Its Description". It is the very heart of this thesis which will explore the concept which was hitherto known as "environmental salvage". The narrative in this chapter will present the deliberations of the International Salvage Union (ISU) in their effort to persuade the international maritime community to accept the proposal for an independent environmental award which failed. The Chapter will also deal with the definitional dilemma of the expression "environmental salvage". Arguably, the appellation is misleading and is a misnomer prompting the change in the description and characterization of the phenomenon to how it is described throughout the thesis as proposed by this author as "environmental protection services". It is contemplated that this chapter will flow into the chapters comprising the remaining substantive parts of the thesis.

Chapter 9 will deal specifically with the issue of indemnification of salvage charges and charges for environmental protection services under the law of marine insurance including H&M and cargo insurance as well as protection and indemnity (P&I) insurance. The legal status of salvage charges as an insured marine risk has historically undergone changes both before and following the enactment of the milestone legislation, the Marine Insurance Act (MIA) 1906 of the United Kingdom. Indemnification of charges for salvage and environmental protection services under the LOF and its addendum the SCOPIC clause, despite being a contractual arrangement between shipowners and salvors, have considerable implications for the insurance system. These will be explained in this chapter. Most importantly, there will be analytical discussion on the different positions taken by property and liability insurers in terms of salvors' proposal for law reform of introduction of an independent "environmental award".

In Chapter 10 the sensitive issue of salvorial negligence in the context of environmental protection services is addressed. It is noted that absence of negligence on the part of the salvor is a prerequisite for the establishment of an independent regime for giving an environmental reward. As such, liability issues relating to salvorial negligence and limitation of the salvor's liability are expounded in detail in this chapter in relation to analyzing the legal, operational and commercial rationale for the existence of a legal regime for salvorial negligence. Obviously English case law is perused in chronological fashion with final word being entrenched in the *Tojo Maru* case[6] and its eventual transition into the Salvage Convention, 1989.

In Chapter 11, flowing from the previous chapter dealing with liability for salvorial negligence, the related topic of responder immunity will be examined. Its origins in

[6] [1969] 1 Lloyd's Rep 133 (first instance); [1969] All E.R., 1179 (C.A.); [1971] 1 Lloyd's Rep 341 (H.L.).

the law and legislation of the United States, in particular, the Oil Pollution Act (OPA 90) will be analytically discussed. Whether or not the concept exists in the true sense in the relevant international conventions will be examined, and how it appears in the domestic legislation of other jurisdictions such as the United States, United Kingdom and Australia will be examined in comparison with the convention law. Whether or not a full-fledged responder immunity regime can serve as an alternative proposition to what is being demanded by the salvage industry will be explored in relevant detail.

Chapter 12 is the Conclusion which provides a chapter by chapter summary of the thesis reflecting the research findings. At least one proposal should be contemplated by the author as an alternative to what is put forward by the ISU on behalf of the salvage industry. Whatever alternative legal regime is proposed will be determined only after all the chapters have been properly revisited and viabilities of the alternative(s) are tested. The proposal, if recommended for consideration, should be aimed at benefitting the shipping industry as a whole while recognizing the indispensability of the salvage industry and the role of marine insurance in the arena of environmental protection services provided by salvors.

2. Legal Theory and Research Methodology

2.1. General Theoretical Propositions

Legal theory involves the study of the theoretical underpinnings for the principles of existing legal systems or branches of those systems. Metaphorically speaking, it is the foundation for the substructures and superstructures of all legal disciplines, and is invariably the centre of gravity of all legal investigations, propositions and conclusions. It is thus the indispensable starting point of legal scholarship in every field of law. Any depiction or analysis of a legal phenomenon, especially an evolving one, must take account of the underlying legal theory.

General legal theory serves as a basic common denominator for all legal systems. A prime example is the core principle of fairness and justice in natural law manifested in the maxim *lex injustia non est lex,* which in essence means "unjust laws are not laws". Other relevant legal maxims are *nemo debet esse judex in propria causa* meaning "no one can be a judge in his own cause", *ubi jus ibi remedium* meaning "there is no right without remedy" and the likes.

General legal theories inevitably extend to different branches of law. From them, specialized theories are derived to serve the purposes of a particular legal discipline in a more effective and meaningful way. To be specific, in criminal law, there are principles such as *nullum crimen, nulla poena sine lege* (there is no crime and no punishment without a pre-existing penal law), *actus non facit reum, nisi mens sit rea* (the act cannot be criminal where the mind is not criminal), *etc.* In the law of contract, the basic theories include freedom of contract, acting *bona fide i.e*., in good faith and *pacta sunt servanda*, meaning "obligation to serve an agreement"; extending to the rules of offer, acceptance and mutuality of consideration or exchange of promises, breaches of contract and commensurate remedies. In the law of tort or delict, the principles of fault, objectivity manifested in reasonableness and evidence of loss, injury or damage, among others, represent the basic legal theories.

Flowing from the above observations, it is necessary to probe into the basic and extended legal theories with regard to the subject of environmental protection services stemming from salvage law whose deep roots lie in those theories.

2.2. Legal Theory in Context

In the present context, the legal principles contained in the laws of salvage, ship-source pollution, and marine insurance are expounded in the order set out in the structure of the thesis. They embrace the basic legal theories of the laws of contract, quasi-contract and tort as applicable to the subject matters of salvage, liability for pollution damage and indemnification of salvage charges under marine insurance law. Beyond the basics, there are other theoretical considerations within the constituent themes of the research topic which also play a vital role in the analytical appreciation of the proposed topic.

The law of maritime salvage is of ancient vintage with its origins in the Rhodian Sea Law dating back to 3000 years ago. Remarkably so, it has been heavily influenced by English Admiralty law in subsequent times. In examining the underlying principles of customary salvage law which infiltrated the modern salvage law governed mainly by conventions, a depiction of the doctrines of restitution, unjust enrichment and *quantum meruit* derived from the *lex maritima* of Roman law is indispensable. Arguably, as expressed in the numerous cases that salvage law is of a peculiarly equitable character, equitable principles rooted in English common law are also analyzed. In terms of its nature, salvage law is widely considered to be *sui generis*, which leads to a discussion of relevant concepts of quasi-contract and implied contract including the views of judges in salvage cases and of academic scholars. Lord Diplock, for example, seemed to advance the view in his decision in *The Tojo Maru*, that the right to a salvage reward sprang from an expressed or implied contractual obligation. The well-known text writer Christopher Hill has rebutted this proposition by submitting that such a view moves "perilously close to an eventual acknowledgment that salvors are not truly volunteers" which they most certainly are.[7]

Regarding the remuneration payable to salvors, the doctrine of “assistance”, otherwise known as *negotiorum gestio*, in civil law, the “helping hand” or “good samaritan” principle in common law and the principle of “no cure no pay” along with the notion of "ultimate preservation of the *res*" in English Admiralty Law are elaborated. In light of this, it is necessary to carry out a dissection of the ingredients of salvage law, namely danger, voluntariness and success. The contractual principles in relation to willful misconduct, gross negligence, damages, limitation of liability and set-off are briefly articulated to deal with salvorial immunity.

Turning to the other two prongs of maritime law that are constituent themes within the research topic, namely, liability and compensation for ship-source pollution damage and marine insurance, various principles of liability in tort or delict,

[7] Christopher Hill, *Maritime Law*, Sixth Edition, 2003, London, Hong Kong: LLP, p. 335

including trespass, nuisance and negligence, and how they are tempered by convention law in the field of ship-source pollution are discussed. In terms of the private law of ship-source pollution damage, the theoretical issues of actionability of claims and *locus standi* of pollution victims as claimants together with the associated doctrines of public trust and *parens patriae* under which states and government entities may qualify as claimants are perused in respect of claims for environmental damage.

With regard to marine insurance, the principal issue is indemnifiability of salvage charges incurred by ship and cargo owners. It involves H&M and cargo insurance, in the present context collectively referred to as "property insurance" on the one hand, and protection and indemnity (P&I) insurance on the other. The principle of indemnity and the notions of “marine risks”, “mutuality” and direct action against the insurer are of significance because of their relevance to indemnifiability of salvage charges incurred in respect of prevention or mitigation of pollution damage and the liabilities of ship owners and cargo owners to pay for salvage services in this regard.

There are several aspects of legal theory specific to two main areas of private maritime law investigated in this thesis, namely, salvage and ship-source pollution. These are addressed in contextual detail as deemed necessary in the respective chapters.

2.3. Legal Research Methodologies

At the outset it must be stated that the topic in question is purely legal in scope, that is, the research endeavour is essentially an exercise in the field of law; therefore, only legal research methodologies, and no other, are employed. Having set this ground rule, attention must be drawn to the inevitable interface between theory and methodology. It is submitted that legal theory provides the premise for the research methodology that is contemplated by the researcher. Thus, the methodology to be employed in respect of a particular subject matter will invariably consist of theoretical perceptions associated with that branch of law. To put the matter in perspective and for the sake of specificity, the research contemplated falls within the field of salvage law which happens to be uniquely maritime in character. Indeed, to be precise, the subject matter concerns the phenomenon of environmental protection services which draws into consideration the private law aspects of ship-source pollution and marine insurance law in relation to indemnification of salvage charges and charges incurred for environmental protection services. Thus, the methodologies employed for researching the subject areas of law will draw on the associated legal theories.

It is said that there is no singular methodology for the conduct of legal research. But law is basically a normative discipline and theoretical in scope. Pure legal research is therefore qualitative and generally not conducive to quantitative analysis of data unless it is a part of inter-disciplinary research or where opinions and viewpoints are sought in connection with the development and formulation of policy that may transform into law. Any conclusion relating to the adequacy or inadequacy of payment for provision of environmental protection services involves quantitative economic analysis, falls outside the scope of this research and is therefore not addressed.

2.3.1. Doctrinal Method

The doctrinal method, otherwise known as the black-letter law approach in British academic jargon and dogmatic method in European civil law circles, is the predominant methodology used in legal research. In civil law jurisdictions it is also described as legal science or legal dogmatics. The doctrinal or dogmatic method, the two terms being used interchangeably in this text, comprise basic legal theory and principles, national legislation, international conventions, instruments *para droit*, case law jurisprudence comprising judicial decisions, and treatises and other scholarly works. Incidental to this methodology is the hermeneutic approach which is at once descriptive and explanatory and extends to legal argumentation. This notion is embedded in legal doctrines and is used for interpreting legal texts. An essential and invariable aspect of the doctrinal methodology is the pursuit of discovering what is the extant law, referred to as *de lege lata*, to determine how in the last analysis it may need to be altered to make it sufficiently certain, coherent and predictable for the benefit of users. The veracity and indispensability of the doctrinal or dogmatic method is the main justification for its use as the primary methodology in legal research. Incidentally, the term “dogmatic” is less favoured in common law jurisdictions as it appears to bear a theological or ecclesiastical connotation. Even though doctrine and dogma are arguably no different in many respects from a terminological viewpoint, common lawyers are more comfortable with the use of the word “doctrinal” rather than “dogmatic”.

2.3.2. Comparative Analysis Method

The comparative law approach, which is another method used in legal research represents the adaptation of one conceptualized perception of a legal phenomenon viewed correspondingly with another. The comparative method in legal research is useful for carrying out *de lege ferenda* (law in the future) analysis, and in searching for uniformity or harmonization in the law. It allows comparisons to be made between and among different legal systems and jurisprudential cultures concerning

the same area of law and facilitates the use of analogies to determine similarities and differences or distinctions in the process of establishing and understanding legal theory or the theoretical underpinnings of law viewed from different vantage points. In the sense so stated, comparative analysis can be described as a lateral or horizontal methodological approach in legal research.

2.3.3. Historical Analysis Method

It is axiomatic that to understand the present one needs to know the past and only a full and reasoned comprehension of the present leads to what may be contemplated for the future. Historical analysis of the law is therefore indispensable to the conduct of research in numerous fields of legal endeavour, not the least of which is maritime law. In almost every maritime law subject, research from a historical perspective is essential in view of the fact that the modern maritime law whether in the public or private law field has evolved from ancient times and is largely rooted in Roman law, particularized by the *lex mercatoria* and *lex maritima*. The historical approach to legal research can thus be described as a vertical approach in terms of methodology.

It can be concluded that all the methodologies discussed above may be utilized independently or in combination, one with another. The common denominator is that the analysis stemming from them are all of the qualitative variety heavily based on legal theory and philosophical thought. That is the very essence of dogmatism or the doctrinal approach which distinguishes legal research from research in other fields such as the pure and social sciences.

2.4. Methodologies in Context

As noted above, the present research topic involves the laws of salvage, ship-source pollution and marine insurance. Inevitably, the concentration will be on the doctrinal method of research in which national legislation on salvage, the private law of ship-source pollution and indemnification of salvage charges will be of significant consideration. The relevant customary law of salvage and the international convention law on salvage and liability and compensation in respect of ship-source pollution, as well as all the relevant case law will comprise the main tools of investigation. In addition, references will be made to authoritative scholarly writings on these subjects. The case law jurisprudence will mainly comprise English judicial decisions which will be factored into the legal analysis. The research questions articulated above will be addressed primarily by utilization of the doctrinal method albeit in conjunction with the historical method.

The doctrinal method embraces discussion on substantive legal theory, which, in terms of the three themes comprising the elements of the central subject matter of the thesis has already been addressed. Employing the doctrinal method, textual analysis of varieties of legal material form the mainstay of the investigation. In the present context, the texts include international conventions, non-mandatory (soft law) instruments, national legislation, commercial instruments, judicial decisions and scholarly works, all of which necessarily pertain to the thematic items identified under the research topic.

Regarding international conventions, the first attempt to unify the law of salvage internationally resulted in the adoption of the Brussels Convention on Salvage, 1910 which survived nearly eight decades and would have survived longer had it not been for increasing global concern over the environmental dimension of salvage which eventually led to the adoption of the Salvage Convention of 1989. The two Conventions, especially the amendments in the latter along with relevant *travaux preparatoires* are examined as one of the focal points. As for ship-source pollution liability with which international organizations are concerned, the International Convention on Civil Liability for Oil Pollution Damage (CLC) of 1969 and 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) of 1971 and 1992 are discussed analytically. The IMO Guidelines on Places of Refuge for Ships in Need of Assistance is an important instrument *para droit* which points to the connection between salvage and refuge in respect of polluting ships. It is examined in detail as required in the context of the research topic.

Concerning national legislation, for example, the Marine Insurance Act, 1906 (MIA 1906) of the United Kingdom which is significantly influential globally, along with the newly enacted Insurance Act 2015 are introduced to demonstrate the indemnification regime for salvage. The Oil Pollution Act, 1990 (OPA 90) of the United States is also examined given that the U.S. ship-source liability regime is different from the convention regime and is said to operate like another international regime because of the position of that country as an importer of oil and the ensuing tanker traffic it engenders.

With regard to commercial instruments, the Lloyd's Open Form of Salvage Agreement (LOF) and its additional addendum containing the SCOPIC clause being the dominant device under which salvage operations are carried out worldwide, will be thoroughly examined. It is important to peruse the different versions of LOF and SCOPIC in chronological order since they reflect to a large extent the evolution of salvage law. Striking examples are the creation of the "safety net" in LOF 1980, the

inclusion of special compensation in LOF 1990 and the creation of a tariff in SCOPIC 1999.[8]

Judicial cases discussed in this thesis comprise mainly English cases with particular reference to the *Tojo Maru* and the *Nagasaki Spirit* dealing with the environmental dimension of salvage. As a typical common law jurisdiction, the English law of salvage has evolved through the cases. In view of the fact that the LOF applies English law only, English arbitral and judicial decisions have exerted significant influence on salvage law internationally and are most likely to continue, which is the reason for giving them due consideration in this thesis.

It must be stated emphatically that much of the legal theory pertaining to the customary or traditional law of salvage is derived from English case law, much of which is historically of ancient vintage but inescapable in terms of gaining a thorough comprehension of the fundamental theoretical principles of that branch of law. Indeed, relatively recent cases in their critical analyses have basically restated those principles as they have evolved historically. These cases have therefore been compellingly discussed in the chapters pertaining to salvage law, and the theory and principles of salvage law are presented as clearly and comprehensively as possible. It is submitted that without a thorough grounding in the principles of salvage law, it is well-nigh impossible for a researcher to even begin to comprehend the legal implications and the attendant complexities of the notion of environmental protection services provided by salvors which is the central theme of this thesis.

Last but not the least, scholarly writings which help to synthesize, analyze, restate and critique case law jurisprudence and legislation, are frequently referred to in this work, in particular, the two acknowledged classics in the field of salvage law, namely, *Brice on Maritime Law of Salvage*[9] and *Kennedy & Rose Law of Salvage*[10].

The positions taken by the two opposing camps in the debate over environmental protection services are expounded in this thesis mainly through the application of the doctrinal method of investigation to determine their respective validities and feasibilities in law and practice. At the 40th CMI Conference Beijing 2012, as well as an explanatory London meeting and the earlier Buenos Aires Colloquium held in 2010 by the International Working Group set up by CMI to deal with the issue of environmental salvage, numerous papers were presented and speeches made expressing the views of the concerned shipping-related industries. These are the main materials used for probing into the polarized views advanced by the two

[8] The current version is SCOPIC 2018.

[9] John Reeder (Ed.), *Brice on Maritime Law of Salvage*, 5th Edition, London: Sweet & Maxwell, 2011, (hereafter referred to as "Brice")

[10] Francis D. Rose, *Kennedy & Rose Law of Salvage*, 9th Edition, London: Sweet & Maxwell, 2017, (hereafter referred to as "Kennedy")

diametrically opposing blocs for and against the proposal for a separate legal regime of environmental salvage. Predicting an outcome is no doubt a formidable challenge, but at any rate, the quest for international harmonization must not be abandoned.

Since salvage is basically old law stemming from the *lex maritima*, propositions and conclusions must take account of how the law has evolved and has been subjected to changes particularly in relatively recent times since the codification of the customary law of salvage through the 1910 Convention. The need for looking at the historical evolution of the subject unfolded at the early stage of the research endeavour. In the context of salvage law, it is necessary to appreciate how the phenomenon evolved historically through developments in multiple jurisdictions simultaneously and in different periods. The historical approach as a methodological tool is thus invariably important and has been used also because of the introduction of new law relating to the environmental dimension of salvage through the 1989 Convention and the SCOPIC element of the LOF. Whereas salvage law has a long evolutionary history, the environmental dimension of it rooted in the law of ship-source pollution is of relatively recent vintage going back only to the *Torrey Canyon* disaster in 1967 as mentioned earlier. This intriguing contrast presents a challenge requiring the opposing parties to seek reconciliation regarding the emerging concept of environmental salvage in the interests of global trade and shipping. Needless to say, the law of marine insurance must fit into the equation for provision of indemnification.

It is tentatively assumed that environmental protection services being an emerging phenomenon fraught with uncertainties and controversies at this embryonic stage, is not conducive to any comparative analysis as yet. But circumstances may change by reason of law reform or industry initiatives; and if that happens, there will be scope for carrying out comparative analysis *de lege ferenda*.

Part II
– Salvage and Ship-Source Pollution

3. Overview of Customary Salvage Law

> "Under the former regime the undertaking of salvage services was a stark gamble. No cure -no pay"
>
> (Lord Mustill in *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323 at p. 332)

3.1. Origins and Evolution

3.1.1. The *Sui Generis* Nature of Salvage

Like maritime law itself, the law of salvage is lost in antiquity. As stated by one well-known author, "Salvage is an ancient idea of maritime law". Presumably, the practice evolved with a view to encouraging seafarers to provide mutual assistance at sea in times of danger and distress and provide legitimacy to their acts that might otherwise have been characterized as theft, extortion or piracy.[11] In an English case as early as in 1698,[12] Holt C.J. remarked that "... salvage is allowed by all nations, it being reasonable that a man shall be rewarded who hazards his life in the service of another". The notion of maritime salvage stems from an ancient Roman law principle that one who voluntarily risks his own life and property to save the property of another becomes entitled to a reward. An observation peculiar to salvage law is that the reward or remuneration itself is referred to as "salvage". Thus, the word has two definitional connotations; namely, the service provided and the remuneration paid for it.[13] Notably, the statement made by the learned Chief Justice was not only an expression of the fundamental rationale underlying the ancient phenomenon of salvage but also one highlighting its international character.

---

[11] Robert Grime, *Shipping Law*, 2nd Edition, London: Sweet & Maxwell, 1991, at p. 276.

[12] *Hartford* v. *Jones,* (1698), 1 Ld. Raym. 393 (91 E.R. 1161). See *ibid* at p. 53 in footnote 92 at that page.

[13] Edgar Gold, *et al*, *Maritime Law*, Toronto: Irwin Law, 2003 at p. 595.

Incidentally, the unique trait of salvage traditionally being a voluntary act, excludes it from belonging to the domain of contract law, even though in practice commercial salvage services are provided pursuant to so-called "open forms" of agreement. One well-known text writer has stated that -

> … it is misleading to refer to 'salvage contracts'. It implies that we are exclusively in the 'world of' the law of contract. We are not. We are into the law of salvage. A perhaps less misleading expression would be 'salvage agreements'.[14]

In a classic salvage case it was held that "the right to salvage was a presumption of law" obliging a property owner to pay remuneration to those who conferred on him the benefit of his property being saved "notwithstanding that he has not entered into any contract on the subject".[15] Thus, salvage is unique to maritime law and it is well established that in its traditional form it does not belong to contract law although there are elements of property law given that the regime operates only in respect of maritime property. Also, in the law of derelict and finder's law, which are branches of salvage law, the common law precept of possession as *prima facie* evidence of ownership, is unmistakably present. Even so, it is submitted that salvage is basically *sui generis* and characterizing it otherwise is misleading and erroneous.[16]

3.1.2. Equitable Character of Salvage Law

The role of equity in the evolution of English salvage law is of remarkable significance. English maritime law scholars and judges have repeatedly attributed the origins of salvage law to equity. In *Five Steel Barges*,[17] Sir James Hannen P. held that "the jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character". Lord Denning subsequently reiterated this statement in *The Teh Hu.*[18] In *The Beaverford* v. *The Kafiristan*, Lord Wright held that "...the maritime law of salvage is based upon principles of equity". [19]

The proposition connecting salvage with equitable principles raises the question whether in its proper context equity connotes fairness in its ordinary sense or refers to the institutional rules of Chancery derived from ecclesiastical principles. It is

---

[14] Christopher Hill, *Maritime Law*, 6th. Edition, London: LLP, 2003 at p. 335.

[15] The *Five Steel Barges*, (1890), 15 P.D. 142, at p. 146, per Sir James Hannen P.

[16] Arguably, however, in the contemporary context of the Special Compensation P&I Clause (SCOPIC) of the Lloyd's Open Form (LOF) which will be discussed in detail later in this thesis, salvage is now closer to being a contract than ever before.

[17] (1890) 15 P.D. 142 at p. 146.

[18] [1970] P. 106 at p. 124.

[19] [1938] A.C. 136 at p. 147.

stated that equity in admiralty, in contradistinction to that exercised by the common law jurisdiction of the English courts, was characterized by the absence of rigidity and stringency. It operated in line with a general sense of fairness rather than in terms of the particular rules of Chancery. The principles of salvage law seemingly evolved in parallel and showed considerable affinity with the principles that emanated from Chancery jurisdiction. The notion of equity in Chancery grew in a systemized fashion and evolved into a consolidated set of rules; whereas equity in admiralty remained characterized by fluidity and flexibility consistent with a general notion of fairness and justice.[20]

Lord Stowell stated in *The Juliana*[21] that a Court of Equity adopts a comprehensive view of all related circumstances to reach a conclusion based on what the real justice of the case may demand. In other words, the institutional rules of equity promulgated by Chancery are applied stringently. He remarked that in many instances, its technical rigidity prevented the common law from rendering real justice which was left to be discovered and applied by other jurisdictions. He further postulated that the Admiralty Court did not possess the character of a court of general equity but simply applied equitable principles according to the rules of natural justice. Thus, the admiralty jurisdiction was relatively fluid even more so than the approach taken by the Chancery which operated according to well-defined rules.

In referring to these contrasting jurisdictional elements, His Lordship had this to say:

> No small part of the Chancery jurisdiction is built upon this very foundation. That exercise of jurisdiction is not seldom so applied to maritime contracts ... A Court of Law works its way to short issues, and confines its views to them. A Court of Equity takes a more comprehensive view and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This Court certainly does not claim the character of a Court of General Equity; but it is bound, by its commission and constitution, to determine the cases submitted to its cognisance upon equitable principles and according to the rules of natural justice.[22]

Having observed that, it is instructive to consider the views of Kennedy regarding the application of equity in the context of Admiralty jurisdiction as it obtains in English law. They are expressed in the following words:

> It is sufficient to note now that the Admiralty Court continues its ancient equitable jurisdiction in adopting a flexible approach to do justice to all the parties in individual

[20] Kennedy, at pp. [10] - [12].

[21] (1822), 2 Dods. 504, 520-521.

[22] *Ibid.*

> cases but that the more rigid rules of equity developed in Chancery may also be invoked where relevant, though they must be applied according to their settled principles.[23]

It is submitted that the merger of equity with the common law has resulted in no equitable notion that may be characterized as belonging exclusively to pre-Chancery English common law. Kennedy elaborates on this proposition in the following words:

> This judge-made common law may itself be divided into common law *strictu sensu* (as developed by the common law courts) and equity (as developed in the court of chancery) - which together make up the home-grown common law of England - and the civil law deriving through canon law ultimately from Roman law, which itself has a professedly "equitable" nature. The meaning of these expressions, particularly of "common law", must be discerned from the sense in which they are used.[24]

Kennedy explains further that the term "common law" normally refers to "judge-made law (possibly including equity) apart from the civil law or, more commonly, to include the civil law so as to distinguish all judge-made law from statute law".[25] It is contextually of historical significance that the common law and admiralty remained in mutual tension well beyond the advent of the fusion between the two branches. In view of its origins being in the civilian tradition, the brand of equity meted out by the Admiralty Court was perceived to be different from that of the common law courts.

One noted author states that "salvage originates in a sort of maritime equity; it is of very ancient date …". He points out that salvage entered the domain of English law through the various medieval maritime codes of Europe and was previously unknown to the common law of England.[26] It is contended that the fundamental principles of salvage law were established by the early 19th century and were subsequently refined by the judges of the English admiralty court.[27] However, it is evident that the Rhodian Sea Law dating back to around 900 B.C., was a part of the law of ancient Greece and other Mediterranean countries under which salvors who offered their services voluntarily were entitled to a reward. This legal norm was

---

[23] Kennedy, at p. [12].

[24] *Ibid*, at p. [7].

[25] *Ibid*.

[26] N. J. J. Gaskell, C. Debattista and R. J. Swatton, *Chorley & Giles' Shipping Law*, 8th Edition, London: Pitman Publishing, 1987, (hereafter referred to as "Chorley and Giles") at p. 427.

[27] Brice, in paragraph 1- 06 at p. [4].

reportedly carried into Roman law.[28] Admittedly, therefore, salvage law stems from established principles of Roman law. In the classic case of *Falcke* v. *Scottish Imperial Co*.,[29] Bowen L.J. pointed out in reference to the laws of salvage and general average that maritime law was quite different in character from the common law and the difference was evident "... from the time of the Roman law downwards".

3.1.3. Roman Law Origins

It is universally conceded that salvage law having its roots in Roman law and having traversed through the medieval European maritime codes such as the *Roles d'Oleron*, the Laws of Wisby and those of the Hanseatic Baltic states,[30] has evolved internationally as customary law and practice and is characteristically similar in civil and common law jurisdictions alike.[31] In *Admiralty Commissioners* v. *Valverda (Owners)*[32] Lord Roche acknowledged that "the law of salvage as administered by the Court of Admiralty is a maritime law derived from ancient and various sources and developed and built upon by decisions of the Court". As pedantic as it may sound, it is submitted that salvage law is by no means an exclusively English law concept regardless of a part of it being rooted in equity. It is said that "salvage is rooted in the general principles of natural equity which gave rise to a cause of action in Roman law".[33] As well, reference is made to "Roman law and equitable foundations of salvage law" by Geoffrey Brice regarded as a leading contemporary authority on the subject of salvage law.[34]

In *The Calypso,*[35] Sir Christopher Robinson, Judge of the Admiralty Court in summarizing the origins of salvage law alluded to its equitable foundation and also to the principles of Roman law that had permeated throughout the European

---

[28] Brice, at paragraph 1- 06 at p. [5].

[29] (1886), 34 Ch. D. 234 at pp. 248-249.

[30] Kennedy at p. [2].

[31] W.K. Hastings, "Non-tidal Salvage in the United Kingdom: Going, Going, Gone", *J. Mar L & Com*., Vol 19, No. 4, Oct. 1988 at p. 475 in note 5 at that page.

[32] [1938] A.C. 173 at 200; see Kennedy at p. [3].

[33] See Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002 at p. 25, footnote 51 where the case of *The Calypso* (1828), 2 Hagg 209 at pp. 217-218 is cited as authority.

[34] See Brice, at paragraph 1-10 at p. [5].

[35] (1828) 2 Hag. Adm. 209 at 217-218; 116 E. R. 221 at 224.

continent. He referred to protection of life and property as "a general principle of natural equity" and held that it gave rise to "a cause of action in Roman law".[36]

Thus admittedly, the right to a reward for saving maritime property has existed since Roman times. The right was seemingly based on the notion that the salved ship should remunerate the person who conferred the benefit.[37] It is also said that the right to salvage comes from the Roman law principle of *negotiorum gestio.* Sir Christopher Robinson in his judgment in *The Calypso* mentioned above expounded the view[38] that the right to salvage derived from this Roman law doctrine.[39] But it seems the contention is not without opposition; that it is a remote analogy according to English case law.[40]

Interestingly enough, there is other scholarly literature suggesting that the Roman law apparently did not recognize the concept of a salvage reward. This proposition is based on the fact that in Roman law, appropriation of a wrecked ship or jettisoned cargo constituted theft that could conceivably subject the perpetrator to civil as well as criminal liability.[41] A clearer exposition of this curious observation is found in the writings of other scholars of maritime law history. In his celebrated historical text on the law of maritime commerce, James Reddie points out that the Roman law did not even give to the "fise" or public treasury the right to acquire shipwrecked goods which their owners were capable of redeeming upon the passing of the storm which had caused the shipwreck. In other words, the owners were only deprived of their possession, not their property.[42] The significance of this is accentuated under the caption "Salvage" in the famous 1930 text of F.R. Sanborn in the following words:

> Where goods were jettisoned to lighten a ship in peril, the better opinion was that they continued to belong to the shipper, and were not thrown over *derelinquentis animo.* Hence, he who takes jettisoned goods *lucrandi animo* is a thief. (Dig XLI, 1, 9, 8; XLVII, 2, 43, 11). If a ship is wrecked, a fortiori, goods cast ashore cannot be considered as derelict (Dig. XLI, 1, 44; XLVII, 9, 1 pr), and in some cases is liable

---

[36] *Ibid* at p. 217-218.

[37] Chorley and Giles, at p. 427.

[38] Apparently based on the Digest of Justinian, lib 3, title 5 (*De Negotitis Gestis*).

[39] See Brice at pp. [5] and [6] in particular, footnote 29 at those pages.

[40] *Falcke* v. *Scottish Imperial Insurance* (1887), 34 34 Ch. D. 344 at p. 348; *Mason* v. *The Blaireau* (1804), 2 Cranch 239 at p. 265 per Marshall C.J. See also Hutchinson, Geoffrey, *Roscoe's Admiralty Jurisdiction and Practice*, 5th Edition. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd, 1931, at p. 126.

[41] Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002 at pp. 15-16.

[42] James Reddie, *Historical View of the Law of Maritime Commerce,* Edinburgh & London: William Blackwood & Sons, 1841 at p. 116.

> to criminal proceedings. The Treasury did not claim a wrecked ship, or things cast ashore, but restored them to their owners (Cod. XI, 6, 1).[43]

While the above passage is without doubt associated with jettisoning of goods and thus an inherent part of the ancient law of general average, the connection to salvage is not only manifested in the title of the passage but also demonstrates that both are saving acts in the maritime domain; and rescue of jettisoned cargo is as much a salvage act as it is one of general average.

Such were the origins of our modern law of salvage rooted on the one hand in principles embedded in Roman law and medieval European Codes, and on the other, the foundations of equity viewed from the English law perspective in terms of the admiralty jurisdiction in juxtaposition to the law of equity emanating from Chancery. From these origins, stem the theory and principles that have governed the law of salvage since its beginnings.

3.2. Theory and Principles of Salvage Law

3.2.1. Restitution and Unjust Enrichment

A discussion of legal theory in relation to customary salvage law must essentially begin with the doctrine of restitution stemming from Roman law which is inextricably linked to the notion of unjust enrichment.[44] It is noted by Kennedy that regardless of salvage law being described as a species of natural equity as discussed above-

> it demonstrates at least an affinity with the broad principle against unjust enrichment, that the recipient of a benefit at the plaintiff's expense should make restitution, a vital principle in Roman law, which legal system has provided one of the strongest influences on the law administered by the Admiralty Court.[45]

As a consequence of the historical fusion between equity and the common law, the doctrine of restitution has, in a broad sense, emerged as an integral part of the common law in contra-distinction to the admiralty law administered by English courts imbued with admiralty jurisdiction. It is incidentally evident that salvage law

---

[43] F. R. Sanborn, *Origins of the Early English Maritime and Commercial Law*, Abingdon, Oxon: Professional Books, Reprint 1989, at p. 16.

[44] In the English law literature on salvage, the term “maritime law” which pointedly signifies the *lex maritima*, is used to describe the customary or traditional law of salvage.

[45] Kennedy at pp. [2]-[3].

also featured in various maritime and commercial codes of ancient and medieval vintage, including the renowned *Roles d' Oleron*. In combination with custom, practice and related scholarly writings, these codes have profoundly influenced the development of English maritime law.[46]

It is notable in this context that under the general rule at common law, no entitlement to payment is recognized for the conferment of an unrequested benefit in respect of property. The principle is reflected in the decision of Lord Mansfield C. J, in *Cornu* v. *Blackstone*[47] where he held that "... no man can be compelled to pay salvage unless he chooses to have the property back". In the leading case of *Falcke* v. *Scottish Imperial Insurance Co*,[48] Bowen L.J held -

> The general principle is beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.[49]

However, as the learned judge points out in his decision, with respect to maritime law, in particular the law of salvage, as handed down from the time of the Roman law, it is the exception to the common law rule that prevails. This is so because trade and mercantile enterprise, and the nature of sea perils in combination with the exertion of considerable stress to save property under exceptional circumstances. He remarks "no similar doctrine applies to things lost upon land nor to anything except ships or goods in peril at sea".[50] It is to be observed that the general rule pointed out by Bowen L.J. in this case has been increasingly viewed as being subject to an exception in terms of the modern law of restitution. Thus, one who receives benefit at the expense of the plaintiff in situations where the plaintiff would be unjustly enriched is required to make restitution to the plaintiff. The exception emerging as the ruling principle is one of the foundations of the law of salvage. Thus the general doctrine of restitution requires the defendant to pay for a benefit he has received at the plaintiff's expense so as to prevent unjust enrichment of the plaintiff.[51] Undoubtedly therefore salvage law in the maritime domain is a part of

[46] Kennedy at pp. [2]-[3].

[47] (1781), 2 Dougl. 641, cited in Kennedy p. [65].

[48] (1886) 34 Ch.D. 234.

[49] *Ibid*. at pp. 248-249.

[50] *Ibid.*

[51] Kennedy at [p.16].

the law of restitution for unjust enrichment.[52] However, one author notes that, salvage is quite different from restitution in that it gives rise to a reward which goes well beyond simply a reimbursement of expenses which in the opinion of that author is a sharp distinction, salvage is peculiar to maritime law as it only applies at sea and tidal waters but never to land. By contrast, restitution is a general principle not limited to application at sea or tidal waters.[53]

3.2.2. Quasi Contract and Implied Contract

There are those who mistakenly consider salvage as a species of a quasi-contract in recognition of the fact that it lacks the elements necessary to qualify as a contract. Even where a standard form of agreement governs the service provided, certainty of consideration which is a requisite for the existence of a contract is missing at the time the parties enter into the agreement because the award is left to be decided by arbitration. Kennedy states that "...the obligation to pay salvage has been seen as one creating a 'civil contract' or 'quasi-contract'".[54] In this context, Lord Wright has commented that salvage being "...essentially a matter of maritime equity ... should be kept apart from common law or equitable ideas of quasi contract".[55] In other words, even though as a concept, quasi contract is admittedly of equitable origin, by no means does it constitute a basis for salvage law. The notion of quasi contract is also said to be a type of implied contract. Lord Diplock held in *The Tojo Maru*[56] that the right to a salvage reward was based on an expressed or implied contractual obligation. It is submitted, however, that any proposition that an agreement to provide salvage services is an implied contract is manifestly misleading. As opined by Christopher Hill, such a proposition treads "perilously close to an eventual acknowledgment that salvors are not truly volunteers" which they most certainly are.[57]

Whereas salvage is indubitably associated with the doctrines of restitution and unjust enrichment, both of which are rooted in equity in English law terms as well

---

[52] *Ibid*, at p. [17].

[53] Robert Grime, *Shipping Law*, 2nd Edition, London: Sweet & Maxwell, 1991, at p. 277.

[54] Kennedy at p. [16].

[55] "Legal Essays and Addresses" (1939) at p. 55. See also Kennedy, *ibid*. and W.K. Hastings, "Non-tidal Salvage in the United Kingdom: Going, Going, Gone", *J. Mar L & Com*., Vol 19, No. 4, Oct. 1988, at p. 476 in footnote 8. Incidentally, Lord Wright is highly acclaimed for his pioneering works on the modern law of restitution.

[56] [1972] A.C. 242.

[57] Christopher Hill, *Maritime Law*, 6th. Edition, London: LLP, 2003 at. p. 335.

as Roman law as discussed above, it is instructive to carefully look at Kennedy's text on the interrelationships. He writes-

> The similar previous description of the major common law component of what is now termed the law of restitution of obligations having in some respects effects similar to contracts provoked their theoretical justification, as types of implied contracts. The misleading association with contract has been rejected in ... salvage cases ... and recently leading maritime lawyers have confidently included salvage within the modern law of restitution for unjust enrichment. Undoubtedly, there are particular rules peculiar to the law of salvage. However, its identification with the general law of restitution is not simply an academic exercise but enables resort to a greater body of authoritative guidance for resolution of practical issues, ...[58]

It is apparent that contrary to what was held by Sir T. Erskine Perry C.J. in *The Lord Dufferin,* where the learned Chief Justice expressed the view that "the true foundation of a salvage claim" was the civil contract,[59] Kennedy seemingly rejects that proposition.[60]

3.2.3. *Quantum Meruit*

Closely associated with the principles of restitution and unjust enrichment is the doctrine of *quantum meruit* which is also of equitable vintage and simultaneously rooted in Roman law. The principle operates in non-maritime cases in common law jurisdictions and is based on the proposition that in the absence of evidence to the contrary, the law does not recognize that any service from which its recipient obtains a benefit, is provided *au gratis, i.e.,* without the expectation of being remunerated.[61] In other words, the provider of a service is entitled to an amount (quantum) of remuneration consistent with to the degree of merit (*meruit*) of the service assessed by reference to the benefit received. Needless to say, the rendering of a salvage service falls squarely within the ambit of this principle.

In *The Tojo Maru*,[62] a case involving salvorial negligence, Lord Diplock held that salvage "...involved the acceptance by the owner of a vessel which was in peril of an offer by the salvor to try to save it for a reward upon a *quantum meruit* in the event of success". The statement reflects the assertion referred to earlier that a

---

[58] Kennedy, at pp. [16]-[17].

[59] (1849), 7 Not of Cas. Supp. xxxiii, xxxv (Bombay S.C.J.) cited in Kennedy at pp. [16]-[17] in note 118.

[60] See Kennedy pp. [16]-[17] cross-referring to paragraphs 1-031-1-032 at pp. [14]-[15].

[61] See for example, the decision of the Supreme Court of Canada in *Degelman* v. *Guaranty Trust,* [1954] SCR 725.

[62] [1972] A.C. 242 at p. 292.

salvage reward is based on the principle of *quantum meruit* and not according to any contract stipulating the consideration for the services provided.

Be that as it may, it is incidentally noteworthy in the context above, that salvage is quite distinct from the doctrine of *quantum meruit* which in its application looks to the work actually done in terms of determining meritorious service. In admiralty, the court may look beyond that to broader issues of principle in assessing a salvage reward.[63] In *Sir William Beckford*,[64] it was held by Lord Stowell that the Court of Admiralty looks to "a liberal remuneration in salvage cases", and "not merely to the exact quantum of service performed … but to the general interests of the navigation and commerce of the country". He opined that "exertions of this nature" and "…fatigue and the anxiety, the determination to encounter danger … the spirit of adventure, the skill and dexterity … all require to be taken into consideration". Lord Stowell went on to say that "actual danger", "value of human life" and preservation of property in danger is to be highly estimated.[65] This dictum more than adequately illustrates the distinctiveness of the legal regime of salvage under admiralty relating to meritorious service as compared with the application of *quantum meruit* under the common law.

Incidentally, as the discussion in this thesis progressively unfolds, it will become apparent that in the context of environmental protection services, it is alleged in some quarters that the extant regime only provides for a recovery of expenses, albeit somewhat enhanced, but does not provide for a proper reward.[66] There are others who are of a contrary view.

3.3. Salvage Jurisdiction under English Law

Jurisdiction in general and salvage jurisdiction in the present particular context is a salient feature of English law. The extant substantive law of salvage is largely contained in the Salvage Convention, 1989 to which the United Kingdom is a party. It is well recognized that much of the Convention represents a codification of the customary law of salvage. On the other hand, salvage jurisdiction under English law is of formidable interest. It has a long-standing history and is central to the current development of English salvage law within the framework of the international convention law and its practice. The origin of salvage jurisdiction in English law

[63] Brice at para.1-102.

[64] (1801) 3 C. Rob. 355.

[65] *Ibid*. at pp. 355-366.

[66] See Archie Bishop "The Development of Environmental Salvage and Review of the London Salvage Convention 1989." *Tulane Maritime Law Journal* 37, No.1 (2012): 65-105.

lies in the law relating to wreck. Jurisdiction over wreck was first legislated through the Statute of Westminster in 1275 previous to which the ownership of all wreck, which included shipwrecked goods found on land or at sea, was vested in the Crown. In later years, Crown ownership was limited to unclaimed wreck; and if such wreck was found at sea, they constituted civil *droits* of Admiralty as the institution known as the Admiralty became recipients of Crown grants. The High Court of Admiralty had not yet been established, but when it came to be so, it exercised *in rem* jurisdiction over maritime property which included all wreck, whether claimed or unclaimed. Furthermore, salvage awards were given to wreck salvors for their services.[67]

As recorded in Professor Wiswall's classic work, the judicial rivalry and rift between admiralty and common law is legion. It prevailed from the beginning of the establishment of the Admiralty Court in 1360 and lasted till the end of the seventeenth century. By that time salvage jurisdiction became devoid of admiralty and was vested in the common law courts.[68] Following several legislative enactments, salvage jurisdiction was eventually placed in the Wreck and Salvage Act of 1846. This legislation reverted salvage jurisdiction back into the admiralty fold to some extent, but the Act was repealed and replaced by the Merchant Shipping Act of 1854 which itself was subsequently replaced by the 1894 Merchant Shipping Act. The present governing legislation is the Merchant Shipping Act 1995 which houses the Salvage Convention of 1989. The substantive law of salvage thus constitutes the relevant provisions of the 1995 Act. Needless to say, the case law on salvage continues to reign as a crucial part of the substantive law. Salvage jurisdiction is now exercised by virtue of the Senior Courts Act,1981, the legislation that provides for the Admiralty jurisdiction of the High Court of England and Wales.

3.4. Public Policy Dimension

3.4.1. Definition of Salvage

Any discussion on the public policy implications of salvage must at the outset be in reference to the explanatory definition of salvage. Notably, there is no finite definition of salvage considering its complexity. The definition of salvage in this

[67] See Kennedy at pp. [54]-[55]; F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800*, Cambridge University Press, 1970 at p. 6-11; Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002 at p. 36.

[68] F.L. Wiswall, *ibid*. chapter 1, and pp. 59-61. See also Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002 at pp. 21, 35-36.

section is provided in the context of public policy.[69] In practical terms, an instructive definition of salvage service is a -

> service which saves or helps to save maritime property - a vessel, its apparel, cargo or wreck - or lives of persons belonging to any vessel, when in danger, whether at sea or on the shore of the sea, or in tidal waters, if and so far as the rendering of such service is voluntary and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty.[70]

The above definition is conspicuously comprehensive. It encapsulates two of the ingredients of salvage which are discussed in detail below.[71] As well, it emphasizes the fact that salvage is a maritime saving act, and as such, is an act of public service albeit one related to shipping, the essentiality of which extends to the public at large and the national interest.

3.4.2. Rationale for Public Policy

Salvage as a maritime phenomenon undoubtedly serves the public good in addition to benefitting the owners of maritime property, *i.e*., ship owners and cargo owners. There is no doubt that in the maritime domain, the availability of salvage services is indispensable. Time and again it has been woefully evident that without the salvage industry operating efficiently and expeditiously, shipping will inevitable come to a halt. The reality is driven home each time there is a serious shipping casualty. Therefore, the Admiralty Court developed the public policy of encouraging salvors to carry out salvage operation, especially professional salvors who keep their personnel and equipment ready to enable timely reaction to disasters. Incentives were provided accordingly.

The public policy perspective in respect of the role of salvors was historically recognized by the maritime community at large at least as far back as the late 1700s in the case of *Nicholas* v. *Chapman*[72] The following dictum of Eyre C.J. in this case points to the invaluable service provided by salvors and the justification for a liberal recognition of it:

> Principles of public policy dictate to civilised and commercial countries not only the propriety but even the absolute necessity of establishing a liberal recompense for the

[69] Another definition of salvage in a different context, namely, the environmental dimension of salvage, is provided in section 8.3 below

[70] Brice at p. 1.

[71] The two ingredients are "success" and "voluntariness". See section 3.5.

[72] (1793), 2 H Bl 254.

> encouragement of those who engaged in so dangerous a service ... Such are the grounds upon which salvage stands.

Needless to say, much consideration was given to the difficulties faced by salvors in the daily pursuit of their livelihood and calling amidst the vagaries of nature in a hostile marine environment. In *Falcke* v. *Scottish Imperial Co*.,[73] Bowen L.J. referred to public policy in the context of saving property at sea in the following words:

> The maritime law, for the purposes of public policy and for the advantages of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.

Two American cases are instructive in this regard.[74] In *The Holder Borden*,[75] the court made the dramatic statement that salvage was awarded for "endeavour so heroic that it is unrivalled in fiction"; and the great jurist Story J. held in *The Henry Newbank -*[76]

> Salvage, it is true, is not a question of compensation *pro opera et labore*. It raises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium by way of honorary reward, by prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that effecting chivalry, which forgets itself in an anxiety to save property, as well as life.

Since the decision in *The Glengyle,*[77] English courts have recognized public policy to professional salvors who maintain equipment and personnel on stand-by waiting for an occasional opportunity. In that case it was held that-

> The Admiralty Court will be liberal in its award in respect of services rendered by salvage steamers, even though the award may somehow fall heavily on individual owners. The owners of salvage steamers invest a large amount of capital in them, and maintain them and their crews, divers and appliances at great expenses, and have no

[73] (1886), 34 Ch. D. 234 at pp. 248-249.

[74] See Proshanto K. Mukherjee, "Refuge and Salvage" in Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships,* Leiden: Martinus Nijhoff, 2006 at p.273.

[75] (1847), 2 Fed. Cas. 331 (No. 6600) (D. Mass).

[76] (1883), 11 Fed Cas (No, 6376).

[77] [1898] P. 97 (Eng. High Court & C.A.), aff'd, [1898] A.C. 519 (H.L.).

> remuneration to look forward to except that may be earned by occasional salvage services.

This point was emphatically followed many years later in *The Makedonia*,[78] where it was held that-

> …for 60 years or more companies incorporated in various countries, and whose names are household words in the shipping community, have carried on the business of professional salvors, maintaining salvage vessels and salvage equipment at strategic points. Such companies employ highly skilled personnel, and it has been recognized by the court of this country, at least since the year 1898, when *The Glengyle* was decided, that services rendered by salvage vessels of this character are deserving of and should receive a particularly generous award…

It is clear that public policy consideration of salvage is historically rooted in the realization that maritime property in the face of danger and sea peril had to be saved. It was a dire necessity for the protection and sustainability of sea trade and commerce which naturally inured to the universal benefit of the public at large. Since the very dawn of human civilization, shipping as an integral part of trade and commerce has served as the life blood of every nation. The indispensability of salvage in world shipping has triggered the policy incentives to support and nurture that industry. The soundness of this universally upheld maritime strategy is undoubtedly laudable and has stood the test of time. In modern times, ship-source pollution entered into the picture and became the center of gravity of concerns in the shipping industry. Law reform had to happen to enable the realization of the public policy of encouraging prevention and mitigation of damage to the marine environment; and salvors indubitably remain the ones most suitable and proficient to provide such environmental protection services.[79]

3.4.3. Incentives and Encouragement

To encourage provision of salvage services as a matter of public policy, incentives have traditionally been provided to successful salvors by way of liberal rewards. Also, courts have in the past displayed relative leniency towards salvors in cases of alleged salvorial negligence.[80] Judicially promoted public policy is mostly manifested by the generous assessment of a salvage reward. In *United Salvage Pty Ltd* v. *Louis Dreyfus Armateurs Snc*, it was stated that as a matter of long-standing public policy, a salvage reward should be such as to-

[78] [1958] 1 Q.B. 365, at p. 374 (Q.B.)

[79] This is elaborated in Chapter 5 of the thesis.

[80] See Section 10.2 of the thesis.

> … encourage others to use the utmost exertion and the utmost promptness in saving such property and lives … To suit this intention, the award must be made, wherever possible, on a much more liberal basis than would be a price decided by economic negotiation …[81]

The liberal approach towards salvage awards is particularly pertinent to salvage services provided professionally which is exemplified by the case law in this area. Several decided cases have portrayed a conspicuously generous judicial attitude in this regard with the object of encouraging salvors to unfailingly undertake salvage work for the benefit of shipping as a whole. This is now reflected in the Salvage Convention 1989, where Article 13.1 addressing the criteria to be taken into account in fixing a traditional salvage reward provides that "the reward shall be fixed with a view to encouraging salvage operations". Out of the listed criteria, at least three are based on the public policy consideration, namely, (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor's equipment and the value thereof and another environmental criterion (b) the skill and efforts of the salvor in preventing or minimizing damage to the environment.

It is contextually significant that in the past salvors were not held liable for damages caused by their ordinary negligence or negligence *simpliciter*. In the Court of Appeal decision in the *Tojo Maru* case, Lord Denning M.R. referred to the public policy issue regarding salvage and impliedly reiterated the liberal view that the salvage industry needed to be protected; that it was in the public interest to ensure that salvors were given favourable treatment given their dangerous occupation and the dire necessity of their services. However, the House of Lords ruled that salvors are liable for negligence and are not entitled to any special treatment. The ruling was given universal statutory effect in the Salvage Convention of 1989 through a provision spelling out in no uncertain terms that salvors owed a duty of care and would be liable if that duty was breached.[82] It is thus apparent that sympathy towards the lot of the salvor has decisively waned.[83] Even so, in the fourth Preamble to the convention, the need for giving incentives to salvors as a matter of public policy is expressly mentioned, which was pleaded unsuccessfully by Geoffrey Brice, acting as counsel for the salvors in *The Nagasaki Spirit*.[84]

---

[81] [2007] 1 Lloyd's Law Report Plus 87, at para.34.

[82] See section 10.3 of this thesis.

[83] Extensive discussion on liability for salvorial negligence is contained in Chapter 10.

[84] [1997] 1 Lloyd's Rep. 323. See in particular p. 332.

3.5. The Triumvirate of Customary Salvage Law

In United Kingdom legislation such as the Marine Insurance Act, 1906, the term "maritime law" rather than "customary law" is used, possibly as a direct translation for *lex maritima* in Roman law from which salvage law is said to be derived. In the view of this writer, the term "maritime law" is too broad and generic lacking the necessary specificity. In contrast the adjectives "customary" or "traditional" in relation to salvage law better describe the phenomenon and is more appropriate terminology distinguishing the law which grew out of custom and practice, from the law embodied in standard forms of salvage agreement such as the LOF. The law in the 1989 Salvage Convention and its predecessor the 1910 Convention are codifications of the customary law which is virtually of universal application. It is acknowledged in this regard that the 1989 Convention has largely superseded the 1910 Convention and has introduced precepts and provisions that go beyond customary salvage law.[85]

There are three requirements which must be met for a salvage claim to be recognized under traditional salvage law. They are danger, voluntariness and success, often referred to as the triumvirate, which have evolved as essentials of the international law of salvage.[86] In the absence of any of these ingredients, a salvage claim is not recognized. Furthermore, in such situation, no salvage maritime lien will arise. The Salvage Conventions being codifications of the customary law, the three ingredients are entrenched in them.

3.5.1. Danger

Exposure to danger is inherent in shipping. Ships are constantly subjected to the vagaries of a hostile marine environment often leading to loss, damage, destruction and injury suffered by the ship, its cargo and on-board persons including crew and passengers. Danger or peril at sea is manifested in numerous ways. Many factors, including natural phenomena and human error including negligence or incompetence as well accidental occurrences can put a ship in a perilous situation. The most common of these are storms, lightening, tsunamis, tidal waves, heavy seas and other forces of wind and wave, collisions, groundings, sinkings, and fires on board. Some mishaps are attributable to structural integrity of the ship, hull and machinery damage, steering or engine failure; others are cargo-related such as fires,

[85] See Edgar Gold, *et al., Maritime Law*, Toronto: Irwin Law, 2003 at p. 596 footnote 8.

[86] See Proshanto K. Mukherjee, "Refuge and Salvage" in Aldo Chircop and Olof Linden (Eds.) Places of Refuge for Ships, Leiden: Martinus Nijhoff, 2006 at p.274; See also Edgar Gold, Aldo Chircop, Hugh Kindred, *Maritime Law*, Toronto: Irwin Law, 2003, at pp. 605-609.

explosions, negative stability, often resulting from the nature of the cargo, accretion of ice in polar seas, overloading, cargo shifting and the likes.

In the classic case *The Charlotte*, (1848),[87] the great English Admiralty jurist Dr. Stephen Lushington held-

> It is not necessary that that the distress should be actual or immediate or ... imminent and absolute; it will be sufficient if, at the time assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered.

A couple of decades later, it was held that absolute danger is not necessary to qualify as salvage service "it is sufficient if there is a state of difficulty, and reasonable apprehension"[88]; and in echoing the words of Dr. Lushington, the Court in *The Mount Cynthos*[89] several decades later added - "[F]or a salvage claim to subsist, the property being salved must be exposed to danger" and "must not be fanciful or only vaguely possible". In a relatively recent case[90], it has been held-

> It is not necessary that the danger should threaten the destruction or total loss of the property. A stranded vessel in no immediate or reasonably apprehended danger of destruction but without reasonable expectation of being able to get off with ease soon, is nevertheless in danger because it cannot pursue its intended voyage or deal effectively with any emergency which might arise.

Danger, in the above context, does not mean that there is an imminent threat of the ship being destroyed or becoming a total loss. For example, a ship that has grounded or is otherwise stranded may not be in any immediate danger; or for that matter, there may not even be any apprehension of danger of the ship capsizing, being broken up or destroyed in some other way. But if there is no reasonable possibility of it being easily and expeditiously refloated, it may be considered to be in danger simply because it would not be in a position to continue its voyage or deal with emergencies in an effective manner as it was held in *The National Defender*.[91] However, in *The North Goodwin No. 16*[92] it was held that a vessel which started to drift as a result of its towing hawser breaking apart was not in any real danger. The reasoning of Sheen J. who dismissed the claim for salvage was that the ship had

---

[87] 3 Wm Rob. 68 at p. 71; 166 E.R. 888 at p. 889.

[88] *The Phantom* (1886), L.R. 1 A & E.

[89] (1937), 58 Ll.L.R. 18.

[90] *The National Defender,* [1970] 1 Lloyd's Rep. 40.

[91] (1970), 1 Ll.L.R. 40.

[92] (1980), 1 Ll.L.R. 71.

three anchors which it could have deployed to prevent drifting as an interim measure until reconnection of the towing gear.

In reference to danger as an ingredient, Kennedy has elaborated on what might not be immediate but is nevertheless real and sensible. He describes it as a situation where there is -

> such reasonable present apprehension of danger that, in order to escape or avoid the danger no reasonably prudent and skillful person in charge of the venture would refuse a salvor's help if it were offered to him upon the condition of his paying for it a salvage reward.[93]

The explanation above raises two questions; one being what is "reasonable present apprehension of danger", and the other - what is "reasonably prudent and skillful". First, the reference to "reasonableness" in both instances points to application of an objective test. Second, the words "present apprehension" in the first phrase suggest anticipation of forthcoming danger. In other words, the ship need not be in the grip of a peril for the danger requirement to be satisfied. Third, it is submitted that the word "reasonably" in the second phrase is superfluous because prudence and skill under general principles of tort law are in themselves to be determined by the application of an objective standard. In other words, the standard of reasonableness is to be applied to determine whether the master was prudent and skillful in reaching the decision to accept or reject a salvor's offer of help.

One view is that a degree of subjectivity is inevitable in the master's determination of whether there was real apprehension of danger even if it was not certain or absolute or immediate; or whether it was fanciful or illusory or only a distant possibility. There is therefore a mixture of the objective and subjective tests involved in the determination of whether there was danger, real or apprehended.[94] As pointed out by one commentator, a purely objective determination of danger in terms of whether professional salvage assistance was required in the particular circumstances may lead to one conclusion if the question was posed of a prudent mariner when it was requested; and quite another if posed at the termination of the services when all the facts had come to light.[95]

---

[93] Kennedy, pp.[160]-[161].

[94] Christopher Hill, *Maritime Law*, 6th. Edition, London: LLP, 2003, p. 340.

[95] Brice, para. 1-186 at p. [57].

3.5.2. Voluntariness

Another ingredient inherent in the customary law of salvage is that of voluntariness. The principal rule is that the salvage services must be rendered voluntarily by the salvor. In other words, only if the salvor, whether upon request made by the master of the ship in danger or distress, or whether upon arrival at the scene of the incident pursuant to information gleaned over the radio or otherwise, performs the salvage operation of his own volition and succeeds, is remuneration payable. The basic or primary rule comprises a number of elements which are elaborated below.

Voluntariness essentially means that there must be no official duty, statutory or otherwise, nor any pre-existing contractual obligation to save the ship or property on board. In *The Neptune* Lord Stowell described a volunteer as-

> a person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship. [96]

Official Duty

Thus, the first element of the primary rule is that services rendered under some form of official duty are not considered as salvage and therefore do not attract payment of salvage remuneration. Examples are services rendered by the Navy or Coast Guard or some other Government-established or statutory body which are typically mandated to carry out salvage, remove wrecks, perform rescue operations. and the like. Under the customary law, such bodies are generally not entitled to claim salvage on the grounds that by virtue of their regular official employment, they receive payment by way of salaries, wages or emoluments anyway. However, it is increasingly the case in certain jurisdictions that governmental bodies are being treated by law in the same manner as ordinary commercial salvors. Their entitlements to remuneration for providing salvage services are being provided through statutory enactments.[97]

In the ordinary course, even without the benefit of statutory entitlement, public bodies will be entitled to claim salvage under customary salvage law in case where the service provided falls beyond the scope of official duties. In emphasizing the requirement for services to be over and above designated official duties, the court in one case held with respect to services rendered by navy personnel that salvage remuneration would not be due if the work was no harder than what would normally

[96] (1824), 1 Hagg. 227.

[97] See for example, Merchant Shipping Act 1995 of the United Kingdom, s. 230(2); Canada Shipping Act, 2001, s.143.

be carried out by such personnel, and if the risk involved was no more than in the ordinary course of their work.[98]

Pre-Existing Contract

A contract may give rise to a pre-existing duty. This is the second type of situation which precludes entitlement to salvage remuneration. Where a salvor operates under a pre-existing contract pursuant to which terms of payment for services rendered are provided for in the contract, there is no entitlement to salvage. In some ways there is a similarity between this and the official duty category of service which also provides for pre-determined remuneration.

There are various types of pre-existing contracts that do not qualify under the requirement of voluntariness and therefore do not attract payment of salvage remuneration. One such situation is where salvage services to a ship are rendered by its crew. The rationale is that in circumstances of danger or peril at sea, crew are under a contractual duty by virtue of their seafarer's employment contract, to save and preserve the ship and the cargo, property and lives of persons on board. However, in the case of a ship being abandoned at sea by declaration of the master, as a result of danger recognized as such under salvage law as discussed above, the crew upon abandonment are no longer bound by their seafarer's employment contract which is deemed to be terminated.[99] In such situation, if the crew assist in saving the ship, and property and life on board, they would be acting as volunteers and would therefore be entitled to salvage remuneration like salvors in the ordinary course if they succeed in their endeavour. In *The San Demetrio*[100] after the ship was ordered to be abandoned by the master having caught fire the crew took to lifeboats. Later the crew were able to return to the drifting ship which was badly damaged, resume its operation and successfully brought it to safety. The court held that the crew acted as volunteers in saving the ship and its cargo and awarded salvage.[101]

A pilot on board is in much the same position as a crew member. Even though he provides services under a pilotage contract, he falls under the authority of the master in respect of his role in the navigation of the ship. Thus, in the ordinary course he is precluded from claiming salvage remuneration same as a seafarer. Indeed, on the whole, judicial attitude towards pilots being on the same footing as salvors has not

---

[98] *The Gorliz*, [1917] P. 233.

[99] Under customary maritime law, a seafarer's contract comes to an end upon abandonment or capture of the ship.

[100] (1941), 69 Ll.L.R. 5.

[101] It is mentioned in Brice para. I-296, p. [86] that the court in that case described the services of the crew as “one of our great English stories of the sea”.

been very favourable.[102] However, in emergency situations where circumstances demand that a pilot stays on board to assist in saving the ship and property and life on board, his services would be considered extraordinary, going beyond his contractual duties, and he would be entitled to salvage remuneration. In making a claim the onus would be on the pilot to show to the satisfaction of the court that the extraordinary circumstances involved work that was more difficult than normal extending beyond his contemplated tasks as a pilot. In *Akerblom* v. *Price, Potter, Walker & Co*.,[103] Brett J. laid down the test for a pilot's entitlement to salvage as follows:

> ...would a fair and reasonable owner and a fair and reasonable pilot, if they had to agree, have agreed under the circumstances that the services to be performed should be performed for ordinary pilotage fees, or even extraordinary pilotage reward, or for salvage reward? Would a fair owner have insisted on requiring the necessary services for ordinary pilotage fees, or even a higher rate of pilotage payment? Would a fair pilot have refused to perform the necessary services unless upon the terms of a salvage reward?

In several cases, interestingly enough, pilots have been able to recover salvage where the courts have applied the above-noted test.[104]

Self-Preservation

Finally, in situations where the crew or passengers engage themselves in saving the ship merely in the interests of self-preservation, it does not constitute a voluntary act; in such cases salvage remuneration would be denied. However, if saving the ship is the main objective of the act and self-preservation is incidental to it, it would be considered a salvage act voluntarily undertaken and salvage remuneration would be payable.[105] The point is illustrated by the well-known case of *The Lomonosoff*.[106] In this case, during the first world war, in an attempt to escape capture by the Bolsheviks, some British and Belgian ships' officers boarded a ship called the *Lomonosoff* which was flying the flag of Northern Russia. The court, per Hill J. held

---

[102] See *e.g., The Eileen Siochu* (1948), 82 Ll.L.R. 128 at p. 133 and *The Notre Dame De Forviere* (1923), 14 Ll.L.R. 276 at p. 277. See also Brice para. I-313 and I-314 at pp [90] and [91] for an elaborate discussion.

[103](1881), 7 Q.B.D. 129 at p. 133.

[104]*The Luigi Accame* (1938), 60 Ll.L.R. 106 and *The Bengloe* (1940), 67 Ll.L.R. 307. For more recent cases, see *The Hudson Light* [1970] 1 Lloyd's Rep. 188 and *The Helenus and Montagu*, [1982] 2 Lloyd's Rep. 261. *In Jackson* v. *Costa Lines* (1980), 490 F Supp. 393, an American case, the court held that in boarding a grounded cruise ship and helping it to refloat, the pilot had acted "beyond the lines of his appropriate duties".

[105] See Brice para. I-215, p. [64].

[106] [1921] P. 97.

that the individuals concerned were volunteers because even though they acted in self-preservation, in the course of doing so, they also saved the shipowner's property from capture by the enemy.

3.5.3. Success

Total and Partial Success

The remaining ingredient which completes the triumvirate of customary salvage law is success of the salvage operation whether it is complete success or only partial. Brice states that "Success" is an essential ingredient of a claim for salvage; the salvor is not entitled to a reward unless he has conferred a "benefit". Even contribution to success is rewardable. In *The Melanie (Owners)* v. *The San Onofre (Owners),*[107] Lord Phillimore expressed this notion with admirable clarity in the following words:

> Success is necessary for a salvage reward. Contributions to that success, or as it is sometimes expressed meritorious contribution to that success, give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward.

In *The Tojo Maru*[108] Lord Diplock explained the meaning of success in relation to salvage by stating - "The first distinctive feature is that the person rendering salvage services is not entitled to any remuneration unless he saves the property in whole or in part. This is what is meant by 'success' in cases about salvage".

With regard to partial success, it was held in *Manchester Liners Ltd*. v. *M.V. Scotia Trader*,[109] a decision of the Trial Division of the Federal Court of Canada that partial success in salvage is rewardable provided the service has been rendered without any negligence or want of ordinary skill. In expressing the requirement for success in the provision of a salvage service, Christopher Hill the author has stated that "[S]uccess need not, however, be total. Partial success, however small, that is to say provided there is some measure of preservation to the owners, is sufficient".[110]

The *Manchester Liners* case also stands for the proposition that a salvage vessel which responds to a distress call and provides salvage assistance is entitled to remuneration even if the ship which received assistance is eventually saved through some other cause. If several salvage vessels are involved in the same operation it

[107] [1925] A.C. 246 at pp. 262-263 (HL).

[108] [1972] A.C. 242 at p.293.

[109] [1971] F.C.R.

[110] Christopher Hill, *Maritime Law*, Sixth Edition, 2003, London, Hong Kong: LLP, at p. 343.

may not be easy to ascertain whether and to what extent a particular salvage vessel has contributed to the success of the operation. At the time of fixing the award, the arbitrator(s) in such a case will have to determine the degree to which material assistance was provided by the particular act of a particular salvage vessel resulted in the amelioration of the dangerous situation. The action of a salvage vessel may in fact be instrumental in worsening the situation.

A good example is the case of *The Killeena*,[111] in which the damaged vessel of that name was abandoned. The crew of another ship, the *Nova* attempted without success to save the ship. The *Beatrice* then came along upon sighting distress signals and proceeded to tow the *Killeena*. The towing hawser parted whereupon the *Beatrice* left the *Killeena* to its own fate. Eventually it was another ship - the *Leipzig* - which successfully towed the *Killeena* into port. It was held by the Court that among all the ships involved, the *Nova* was the only one which was not entitled to salvage because its crew failed to materially assist in the salvage of the *Killeena.*

It is evident from the dictum of Lord Phillimore cited above that there is a significant difference between meritorious service and success. In other words, regardless of the effort expended and costs incurred by the salvor, if there is no success, there is no salvage reward. Stemming from the same dictum is the proposition that there must be "ultimate success" which means that the salved property must be preserved to the ultimate. Lord Phillimore went on to state in that passage that- "[S]ervices which rescue a vessel from one danger but end by leaving her in a position of as great or nearly as great danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage rewards".[112]

Ultimate Preservation of the Res

From the above proposition springs the notion of "ultimate preservation of the *res*" which is an integral part of success. As stated by one author, "...a salvor may expend considerable effort in mobilizing crew and equipment over an extended period of time to retrieve a damaged or sunken vessel and its cargo, only to discover that he is not entitled to any remuneration because he failed to ultimately preserve the *res*".[113] The author goes on to say- "It frequently happens when a polluting vessel undergoing salvage is refused refuge and its salved value is depleted; or worse still, the ship is taken to the high seas and sunk or otherwise destroyed, when its salved value is reduced to zero".[114]

---

[111] (1881) 6 PD 193.

[112] *Melanie (Owners)* v. *San Onofre (Owners)* [1925] A.C. 246 at p. 262-263.

[113] Proshanto K. Mukherjee, "Refuge and Salvage" in Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships,* Leiden: Martinus Nijhoff, 2006 at p. 274.

[114] *Ibid*.

Thus, if a ship has been successfully salved in the first instance but on its way to a place of safety or refuge it sinks or is destroyed, under the traditional strictures of salvage law, there is no entitlement to salvage because the requirement of ultimate preservation of the *res* is not met. The salvor may well be walking empty-handed in such cases because in salvage law there is no reward for honest attempt if there is no ultimate success. The caption "no cure no pay" in the LOF epitomizes the virtually unshakeable harshness of this rule, although as will be seen as the discussion on environmental protection services unfolds, this infamous appellation has undergone considerable dilution in the context of the environmental dimension of salvage.

Useful Result

The precept of success in customary salvage law is codified in Article 2 of the Salvage Convention 1910 providing “Every act of the assistance or salvage which has had a useful result gives a right to equitable remuneration. No remuneration is due if the services rendered have no beneficial result…”and later in Article 12 of Salvage Convention 1989 which provides that "Salvage operations which have had a useful result give right to a reward" and "...no payment is due under this Convention if the salvage operations have no useful result".[115] It means that the efforts of the salvor must yield a useful result which is another way of saying that a benefit must be conferred on the owner. In Article 8 of Salvage Convention 1910 and Article 13.1 of the Salvage Convention 1989, the phrase "measure of success obtained" is used as one of the listed criteria to assess the salvage reward.

Despite some doubt regarding the implications of linguistic shift from “success” to “useful result”,[116] the two expressions and “beneficial result” are synonymous when used to articulate the cause of action in a salvage claim and the assessment of salvage remuneration.[117]

No Cure No Pay

The traditional law of salvage is said to be *sui generis* in that it belongs neither to the domain of contracts nor any other general branch or category of law. Notably, only maritime property can be a subject of salvage. Even though the right to salvage does not rest on contract,[118] in practice, as mentioned above, commercial salvage today is carried out by professional salvors, pursuant to standard form agreements

[115] Article 12 paragraph 1 and 2 of the International Convention on Salvage, 1989, 1953 *UNTS* 165.

[116] Kennedy, at 9-004.

[117] Brice, para. I-359 at p. [103].

[118] *The Hestia* [1895] P.193, at p. 199, per Bruce J. For details of the source and underlying principles of salvage law, please refer to Kennedy, at para. 21-49 at pp. 11-28.

such as LOF.[119] The expression 'no cure – no pay' reflecting the customary law requirement of ultimate success is inserted in the LOF drawing indubitable attention to it as a fundamental tenet of salvage law. Whereas 'cure' connotes success, 'pay' indicates the right to a reward. Needless to say, there is no compulsion on the use of the LOF which is based on 'no cure - no pay'. The parties are free to contract on the basis of a fixed remuneration regardless of success on the part of the salvor. In such cases, the principles of traditional salvage law would not apply. Rather, the relevant law of contract will be applicable as it prevails in the jurisdiction in principle. Such contractual arrangements are often referred to as 'contract salvage', but the expression is not exactly a model of clarity.[120]

3.6. Maritime Property

In customary salvage law, a claim is recognized only if the *res* in question is a proper subject of salvage; and only maritime property as may so qualify as a subject of salvage. In English law, maritime property basically consists of vessel including apparel, stores and bunkers, cargo and freight at risk.[121] The term "apparel" in nautical jargon is used in combination with "tackle" and "furniture" refers to various fittings on the ship's superstructure such as masts, sails, derricks, cranes, riggings and other associated gear.[122] Parts of the vessel and cargo following a casualty comprising flotsam, jetsam, lagan, derelict and wreck have been judicially ruled to qualify as maritime property.[123] These have been judicially defined in the classic case of *Constable* v. *Gramble*, otherwise known as *Sir Henry Constable's case*,[124] as follows:

> Nothing shall be said *wrecuum maris* but such goods only which are cast or left on the land by the sea; for *wrecuum maris illa bona quoe naifragio ad terrum appeluntur flotsam* is when a ship is sunk, or otherwise perished, and the goods float on the sea; *jetsam* is when the ship is in danger of being sunk, and to lighten the ship the goods

[119] *N.V. Bureau Wijsmuller* v. *"Tojo Maru" (owners)* (The *Tojo Maru*) [1971] 1 Lloyd's Rep. 341 (H.L.) at p. 362, per Lord Diplock.

[120] See section 3.8 of this thesis.

[121] Brice, para. 3-01 at p. [219]; Christopher Hill, *Maritime Law*, Sixth Edition, 2003, London, Hong Kong: LLP, at p. 336.

[122] D.R. Thomas, *Maritime Liens,* British Shipping Law Series, Vol. London: Stevens & Sons, 1980, para. 278 at pp. 156-157.

[123] See Lord Esher's dictum in *Gas Float Whitton No. 2,* [1896] P.42 (C.A.). discussed in Brice, *ibid.* and Gold *et al*. at pp. 599-600.

[124] 5 Coke's Rep Part VI, 106a.

> are cast into the sea, and afterwards notwithstanding the ship perish. *Lagan (vel potius ligan)* is when the which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again, and *dicitur lig. a ligando*; and none of these goods which are called jetsam, flotsam, or ligan, are called wreck, so long as they remain in or upon the sea, but if any of them by the sea be put upon the land, then they said be said wreck.[125]

By contrast to the above-noted judicial definition, s.255 (1) of the UK Merchant Shipping Act 1995 defines "wreck" as including "jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water". The conceptual change is historical, the background to which can be gleaned from relevant historical legal literature.[126]

Notably in the 1989 Salvage Convention there is no mention of maritime property but "property" is defined in Article 1(c) as "any property not permanently and intentionally attached to the shoreline and includes freight at risk"; and "vessel" as "any ship or craft, or any structure capable of navigation". It is apparent that "vessel" is wider than "ship" but arguably "craft" which can include a raft is wider than "ship" as well and could be a subject of salvage pursuant to the Convention.[127] "Any structure capable of navigation" seems to be quite broad, that is, not necessarily one that is actually navigating. However, Article 3 of the Convention presents an anomaly. Under that Article, fixed or floating platforms and drilling rigs including mobile offshore drilling units (MODUs) which may be "structures capable of navigation" are excluded from the application of the convention when they are on location engaged in carrying out exploration, exploitation or production of mineral resources from the sea-bed, meaning when they are stationary. In other words, they do not fall under the application of the Convention even if they are capable of navigation but not actually navigating. In the opinion of Brice, with which this author is in agreement, it is irrelevant whether a platform is "fixed" or "floating" or "capable of navigation" because Article 3 only applies if the structure in question is engaged in exploration or exploitation activities. Thus, such a structure including a MODU would be a subject of salvage if it is not so engaged.[128]

---

[125] Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice*, 4th Edition, London: Informa, 2011, para. 2.154 at p. 75.

[126] See e.g., *ibid*. and Frank L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice Since 1800*, Cambridge University Press, 1980.

[127] For a comprehensive discussion on the concepts and definitions of "ship", "vessel" and "craft", see Brice, paras. 3-08 and 3-09 at pp. [220] and [221].

[128] Brice, para. 3-14 at pp. [222] and [223].

The above analytical discussion is important in view of the decision of the House of Lords in an older case the *Gas Float Whitton No.2* in which it ruled that a gas float, which was an unmanned lightship shaped like a boat and moored in tidal waters, did not qualify as a subject of salvage because it was neither intended nor fitted for navigation. The Court remarked that the salvor's argument was more ingenious than sound and held in essence that everything that looks like a ship is not a ship for purposes of salvage.[129] It is submitted that the decision is an anomaly in today's milieu of salvage where an aircraft may be a subject of salvage, albeit pursuant to statute,[130] but a buoy or beacon adrift which are far more "maritime" in character than an aircraft, may not. In the opinion of Brice, the convention definition of "salvage operation" in Article 1(a) of the Salvage Convention, 1989 referring to "any other property in danger in navigable waters or any other waters whatsoever" has the effect of overruling the *Gas Float Whitton No.2* decision.[131] This author is fully in agreement with this view.

“Freight at risk” is also a well-recognized subject of salvage in both English law and the Salvage Convention 1989. It means the freight that is due and payable upon delivery of the goods at destination rather than prepaid and non-refundable freight. Unlike vessel and cargo, freight is not physical but a legal right to recover remuneration payable for carriage of goods. The carrier would have been deprived of such right but for services provided by salvors. The law recognizes remuneration to salvage of freight at risk as a financial benefit arising from saving of physical property, as if it were a form of physical property.[132]

3.7. Life Salvage

It must be apparent from the discussion so far in this chapter that the regime of salvage centers on saving of maritime property. However, it is recognized that it is not only property that is at risk at sea but human life is also exposed to the perilous consequences of a potentially hostile maritime environment. Humans not only comprise the ship's crew but also passengers in certain instances. The question thus arises as to whether and to what extent is salvage of life considered to be a subject of salvage that can give rise to payment of remuneration. The discussion in this

[129] *The Gas Float Whitton No. 2* (1896), P.42; affirmed by (1897), A.C. 337. See also Chorley and Giles at p. 429.

[130] Senior Court's Act 1981 s. 20(2)(j) and s. 20(6)(c). See also Brice, paras. 3-54 to 3-56.

[131] Brice, para 3-10.

[132] Brice, para 6-05.

section naturally flows from the detailed consideration of salvage pertaining to property.

Life is not recognized as an independent subject of salvage under customary salvage law. It was held in *The Aid*[133] that there is no pure life salvage without property salvage. It therefore seems technically inappropriate to refer to saving or assisting lives as life salvage,[134] because the word "salvage" *per se* in the context of maritime law connotes the intention of primarily, if not only, salving maritime property and not in respect of life salvage.[135] However, the expression is commonly used in salvage law as a feature for the enhancement of a salvage reward, and ostensibly, there is no confusion "provided it is not used without regard to the law as it actually is, and particularly to whether the claimant has rendered a service to life alone or also to property or the environment".[136] The reason for disallowing life salvage on its own was the functional realism that without salved property, no fund would be available to pay for life salvage. Based on this premise, it was later thought that payment of life salvage could be justified in legal and practical terms if life was saved together with property in the same incident, with the latter providing the funding source for payment respecting the former. In substantiating this proposition, Brett L.J. held in *The Renpor*[137] that remuneration for life salvage was only possible if something more than life was saved which would provide the fund from which life salvage could be paid. Similar decisions were rendered in *The Fusilia*[138] and in more recent times, in *The Bosworth*[139].In *The Fusilia*, Dr. Lushington explained the legal position in the following words:

> Where no property had been saved and life alone had been preserved from destruction, no suit for salvage reward could be maintained. One reason for this state of the law was that no property could be arrested applicable to the purpose. There could be no proceeding in rem, the ancient foundation of the salvage suit. In some cases, it happened that one set of persons exclusively saved life, and another wholly distinct set saved the ship and cargo but in this case also the salvors of life could not render the property amenable to their claims. But where life and property had been saved by one set of salvors, it was the practice of the court to give a larger amount of

[133] (1822), 166 E.R.30.

[134] Kennedy, at para 4-111.

[135] Huiru Liu, "Environmental Salvage: 'No Cure-No Pay' in Transition", 23 *Journal of International Maritime Law*, 2017, at p.285.

[136] *Ibid.*

[137] (1883), 8 P.D. 115 at p. 117.

[138] (1865) 3 Moo P.C. (N.S.) 51.

[139] [1960] 1 Lloyd's Rep.163 (C.A.).

> salvage than if the property only had been saved and this doctrine rests on high authority.[140]

It is evident from the above passage that life salvage was not recognized in the original law of salvage because in English law a salvage claim gave rise to a maritime lien which could only be enforced through the institution of an action i*n rem*. Such action being an action against the *res,* that is, an action against the ship, cargo and freight as maritime property could not possibly accommodate a claim for life salvage. In *The Zephyrus*,[141] Dr. Lushington held -

> The jurisdiction of the Court, in salvage cases, is founded upon a proceeding against the property which has been saved, and I am at a loss to conceive upon what principles the owners can be answerable for the mere saving of a life.

There is no doubt, that as a matter of public policy driven by ethical and humanitarian considerations, saving life must be accorded a preferential position in the law of maritime safety. However, recognition of rewarding a salvor for life salvage could result in putting a value on human life which would be morally repugnant and also inconsistent with social values. Saving human life should be considered a moral duty which should be carried out by human beings without the expectation or enticement of a reward.

There is, of course, the humanitarian issue of moral obligation. It has long been a custom of the sea that attempts must be made to save life but it is doubtful that doing so gives rise to a legal obligation to pay life salvage in the absence of property being saved concurrently. The law in some jurisdictions legislates as a matter of public policy by stipulating that where life salvage is payable, that is, where a fund has been constituted from the salved value of property saved, it must be paid in priority to other salvage claims.[142]

Payment for life salvage has now been firmly established in Article 16 of the 1989 Salvage Convention[143] which provides for "salvage of persons". Under paragraph 2 of this Article, a life salvor is entitled to be paid a fair share of the award given in respect of saving property. A significant proviso in this respect is that under paragraph 1 of this Article no payment can be demanded of the person whose life is saved. Another important provision in that paragraph is recognition of the primacy of national law "on this subject". It is clear that "this subject" refers to the whole subject of life salvage as contained in Article 16 of the Convention. In other words,

---

[140] *The Fusilia* (1865) 3 Moo P.C. (N.S.) 51, at p. 55.

[141] (1842), I.W. Rob. 329.

[142] Cayman Islands Merchant Shipping Law, (2016 Revision), s.295(2)

[143] 1953 *UNTS* 165.

a state party may choose not to give effect to Article 16 at all and its national law may preclude remuneration for life salvage altogether. The retention of this national prerogative seems to reflect the regime of salvage as it was originally.

3.8. Salvage Agreements and Contract Salvage

Closely associated with the pre-contractual duties as grounds for rejection of salvage remuneration is the notion of contract salvage. The terminology is somewhat confusing in that its distinction with a salvage agreement is not readily appreciable. Given that virtually all commercial salvage today is carried out by professional salvors pursuant to standard form agreements such as the LOF, the notion is not quite straightforward and faces the argument that salvage in the modern context carried out under an LOF or similar agreement, is contract-based. However, as explained below, a salvage agreement is not a contract but contract salvage is. It is contextually notable that salvage carried out under an LOF-type agreement which reflects the customary law of salvage gives rise to a maritime lien.[144]

3.8.1. Lloyd's Standard Form of Salvage Agreement (LOF)

The Lloyd's Standard Form of Salvage Agreement is no doubt the dominating salvage agreement used in practice internationally. It is widely known as the Lloyd's Open Form or LOF, the word "open" reflecting the fact that the salvors' remuneration under the agreement is left open to be decided by arbitration. The genesis of the so-called Lloyd's Open Form dates back to 1891. The form devised in that year was revised and altered in 1892 and was issued as the first Standard Form which was subsequently amended over a period of time. As stated in the leading text on the subject, revisions were made to accommodate developments in the case law, salvage practice and technological advancements.[145] The current version is LOF 2011. For the purposes of this discussion, the 1980 version is of primary significance as it introduced the concept of "safety net" elaborated later in this thesis.[146] Also, the versions of 1990 and 1995 incorporated the Salvage

[144] See UK Merchant Shipping Act 1995, s. 224 and Senior Courts Act 1981, s.20(6); Clause 4.7 of Lloyd's Standard Salvage and Arbitration (LSSA) Clauses 2011 of LOF 2011, Article 20 of International Salvage Convention, 1989. See also Christopher Hill, *Maritime Law*, Sixth Edition, 2003, London, Hong Kong: LLP, at pp. 95, 356; Brice paras.8-79 and 8-80 and para. 8-98 referring to the decision of Bateson J. in *The Goulandris*, [1927] P.127; Ll. L. R. 120 at pp.125-126.

[145] Kennedy, at p. [337] - [338] where 11 revisions have been identified.

[146] See section 5.6.2 of this thesis.

Convention 1989[147] and the 2000 version introduced the SCOPIC clause[148]; all of these are germane to the notion of environmental protection services.

Earlier versions of LOF were quite lengthy. Since LOF 2000, the standard form has been progressively simplified as a two-page document containing 16 short clauses and boxes to be filled in, namely, names of the salvors referred to as the Contractors, name of the vessel and persons signing on their behalves, the date and place of the agreement, the agreed place of safety if any, the agreed currency of any arbitral award and security, and whether SCOPIC is incorporated. Terms on security, arbitration and procedure are contained in separate documents added to the LOF but they do not have an independent existence. By resorting to separate documents, the main agreement LOF is left short and simple to enhance its practical utility. To be more specific, LOF 2011, the current version, incorporates by reference the Lloyd's Standard Salvage and Arbitration Clauses 2014 (LSSAC 2014) and the Lloyd's Procedural Rules (LPR 2000).[149]

It is no secret in the maritime community that the usage of LOF has dropped dramatically. Historic Lloyd's data shows that prior to 2003, there had never been any calendar year when fewer than 100 new LOF contracts were signed worldwide. However, since then, usage of LOF has decreased rapidly with the record figure of 37 LOF cases in 2014, 44 cases in 2015, 48 cases in 2016 and 63 cases in 2017.[150] Be that as it may, LOF remains the best standard form for emergency response situations. It ensures rapid intervention in an evolving casualty situation.

One of the reasons for the reduction of LOF salvage cases is improvement in maritime safety and a corresponding reduction in serious casualties. Additionally, at the behest of property insurers, in recent years, there has been a growing tendency in the striking of private side-deals altering the fundamental nature of the LOF, such as capping the reward available under it or basing remuneration on a "cost-plus" formula. Salvors are being forced to use them more frequently due to intense competition and the push from the property insurance industry which intends to keep the benefits of LOF with a certain capped reward figure.[151]

Notably, P&I clubs are opposed to LOF with side-deals and the P&I industry has already issued warnings regarding this matter. Since they are liable for the

[147] This point is elaborated in section 5.6.3.

[148] This point is elaborated in Chapter 7.

[149] Kennedy, para. 10-074.

[150] The data is drawn from official website of Lloyd's, https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/archive-documents.

[151] Gard, "Is the Lloyd's Open Form salvage contract dying?", http://www.gard.no/web/updates/content/23582625/is-the-lloyds-open-form-salvage-contract-dying

difference between the salvage reward and the SCOPIC remuneration where SCOPIC is invoked and the SCOPIC remuneration exceeds the ultimate salvage reward, capping of salvage rewards potentially results in increased SCOPIC exposure for P&I clubs.[152]

3.8.2. Contract Salvage

Contract salvage, both in concept and in terminology is very much associated with American and Canadian law and practice. Furthermore, contract salvage does not operate within the ambit of danger to qualify as customary salvage under which salvage remuneration is payable. Usually the owner of a ship or other property will enter into a contract salvage arrangement after the danger has come and gone, the ship is lying sunk or stranded and needs to be lifted or floated, as the case may be. The owner enters into a contract under which the task of the salvor is to lift or refloat the ship for which he receives a negotiated amount as consideration in the form of payment for the services. Also, the payment may be contractually due regardless of success of the operation, full or partial or even none. Contract salvage is not a voluntary act as in the case of traditional salvage. To put it in precise and concise terms, contract salvage bears all the characteristics of a regular contract, whereas a salvage agreement is a peculiarity of salvage law that is *sui generis*. This characterization stems from the recognition that under customary law, salvage is distinctively different from contract. In a proper contract, consideration must be pre-decided; otherwise the transaction will not be recognized as a contract for want of certainty which is an essential requirement for a contract to subsist.

A salvage agreement such as the LOF does not bear the hallmarks of a contract because remuneration which is the consideration payable to the salvor is left to be decided by arbitration. Furthermore, the shipowner enters into the agreement with the salvor in the face of danger or apprehension of it which is an essential ingredient of customary salvage. The parties do not enter into the salvage agreement in anticipation of danger arising in the future or after the danger ceases to exist such as when the ship has already suffered damage or has sunk as a result of experiencing the danger or peril. The salvor offers his service voluntarily through the LOF which is basically the mechanism used to ensure payment pursuant to arbitral proceedings.

In a recent Chinese case involving refloating by the plaintiffs of a grounded Greek vessel owned by the defendants off the port of Guangzhou, the Supreme People's Court held that the services provided by the plaintiffs Nanhai Rescue Bureau of the Ministry of Transport did not fall under the "no cure-no pay" regime of salvage under the Chinese Maritime Code (CMC) giving effect to the Salvage Convention, 1989 to which China is a party. Rather, they were in the nature of an "employment

[152] Britannia P&I Bulletin, "LOF Side Agreements", https://britanniapandi.com/wp-content/uploads/2018/01/Bulletin-LOF-Side-Agreements-01-2018a.pdf.

contract for salvage" falling under the Contract Law of PRC. The defendants were held liable to pay the whole contract price regardless of whether or not the salvors were successful in salving the vessel.[153] No doubt, the Chinese law concept of "employment contract for salvage" as propounded by the Supreme People's Court is akin to contract salvage as it is known in other jurisdictions.

It is observed, however, that there is now a tendency to contractualize salvage agreements as exemplified by SCOPIC in the context of environmental protection services and the newly proposed LOF Light. SCOPIC being an addendum to LOF brought in a tariff system to assess the payable remuneration to salvors for environmental protection services, leading to a fixed and certain amount as consideration. Such contractualization is eroding the practice of traditional salvage services to save property. As mentioned above, recent times have witnessed a dramatic decline in the usage of LOF in salvage operations. To reduce grievances expressed against LOF, a new version called "LOF Light" has been proposed introducing SCOPIC tariff rates as the basis for assessing salvage rewards under Article 13, that is, for providing traditional salvage to preserve maritime property.[154]

3.9. Concluding Remarks

In this chapter an overview of salvage law has been provided as a prelude to the more detailed discussion on environmental protection services provided by salvors, the central theme of this thesis, addressed in Part III and IV. The purpose has not been to enter into a comprehensive analytical treatment of the subject of salvage but rather to "hit the high points", so to say. As such, it has not been considered necessary or expedient to address all aspects of the law of salvage. References to the Salvage Conventions 1910 and 1989 have been made wherever it has been found to be contextually relevant to the matter under discussion. The same approach has been adopted with regard to domestic law, mainly that of the United Kingdom, as the subject matter of salvage is intimately connected to English case law and the admiralty jurisdiction of England. Topics such as the environmental dimension of salvage and salvorial negligence have been left to be addressed in detail in other chapters. The focus of this chapter has been on the historical origins of salvage law and the timeless fundamental principles which continue to govern the law of salvage.

---

[153] See Proshanto K. Mukherjee, Commentary on *Nanhai Rescue Bureau of the Ministry of Transport of PRC (Appellants)* v. *Archangelos Investments E.N.E. (Respondents) (The Archangelos Gabriel*), Final Appeal Hearing before President Madame Justice He Rong, in (2016) 22 *JIML* 262-263, Even though there is no mention of "employment contract for salvage" in any legislation, it is an integral part of Chinese law as a judgment of the Supreme People's Court.

[154] Nigel Lowry, "Salvors and Insurers Mull Proposed New LOF Contract", Lloyd's List, 20 September 2018. This point is discussed in detail in Chapter 7.

4. Liability and Compensation for Ship-Source Oil Pollution

> "'pollution damage'means … (b) the costs of preventive measures and further loss or damage caused by preventive measures. "
>
> (CLC 1992, Article 2 paragraph 6)
>
> "'preventive measures'means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage."
>
> (CLC 1992, Article 2 paragraph 7)

4.1. Preliminary Remarks

It is well-known and acknowledged that pollution of the seas is mainly attributable to land-based sources comprising not only pollution from industrial run-offs containing toxic substances and domestic waste including concentrated sewage and garbage, but also air-borne pollutants such as greenhouse gases emanating from land and ending up at sea.[155] Pollution emanating from the sea bed is also another source which can have devastating effects as grimly demonstrated by the *Deepwater Horizon* oil platform disaster in the Gulf of Mexico in April 2010.[156] This chapter is not concerned with land-based pollution or pollution from the sea-bed but rather with pollution of the seas from ships; to be specific, it deals with private law implications focusing on liability and compensation relating to damage resulting from ship-source pollution. The discussion is mainly based on the convention regimes of ship-source pollution liability and compensation although consideration of the pre and non-convention regime is inevitable and inescapable given that not all states are parties to the conventions in question.

---

[155] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Third edition, Berlin Heidelberg: Springer-Verlag, 2013 at p. 265.

[156] https://global.britannica.com/event/Deepwater-Horizon-oil-spill-of-2010 last visited 16 September, 2016.

4.2. Concept of Liability and Compensation

At the outset of the discussion, a probe into the theoretical and philosophical underpinnings of the law giving effect to international regimes and national policies should be in order. In this vein, it is first necessary to gain an adequate appreciation of the general concept of civil liability.

It is stated by a noted author that liability in law is a qualitative phenomenon. It is a measure of the quality of conduct of a person that is repugnant to the law making the person answerable in law if such conduct results in loss, damage, harm or injury to another person.[157] A relevant issue in this regard is the inter-connection between liability and responsibility. It is noteworthy that both these words appear in the heading and body of Article 235 of UNCLOS in Part XII of the Convention which deals with "Protection and Preservation of the Marine Environment" albeit in the context of inter-state liability for pollution damage inflicted by one state on another. In relation to this, one distinguished author, among others, is of the view that responsibility denotes a duty or obligation in international law, a breach of which gives rise to liability.[158] One relevant issue regarding the word "responsibility" is its common law connotation in the sphere of private law versus the implication of that word in some civil law jurisdictions which is largely a matter of linguistics coupled with law. In the English common law, as compared with liability which is undoubtedly a legal concept, responsibility is said to have no legal effect. It is rather a moral or ethical concept. To put the matter in perspective regarding the two terms, it can be said that liability is legal responsibility or responsibility with legal consequences.[159]

In some civil law jurisdictions where the reigning language is French or Spanish, among others, there is the word "*responsabilite*" which sounds like "responsibility" in English but actually corresponds to the English word "liability". The singularity of the word "*responsabilite*" often results in potential confusion and misunderstanding among law professionals, jurists and scholars.[160] By contrast, and notably so, compensation is a quantitative concept which denotes the amount payable by the person liable. In other words, to put it simplistically and succinctly,

---

[157] Proshanto K. Mukherjee, “Liability Issues Pertaining to Maritime Safety”, in Jingjing Xu, Michael Roe and Dong-Ping Song (Eds.) *Contemporary Issues in Marine and Maritime Affairs*, 2011, University of Plymouth at pp. 7-20.

[158] Brian Smith, *State Responsibility and the Marine Environment: The Rules of Decision*, Oxford Clarendon Press, 1988.

[159] Proshanto K. Mukherjee & Huiru Liu, "Safety and Security in Shipping: International, Common Law and Chinese Liability Perspectives", in Albert Tavidze (Ed.) Progress in Economics Research, Vol. 33, New York: Nova Science Publishers Inc., 2015 at p. 37.

[160] *Ibid*.

the quantity of damages payable for committing a civil wrong as in a tort, is in direct correlation to the quality of conduct of the wrongdoer.[161] In the context of pollution law, or to put it in more precise terms, the law of ship-source pollution with which this work is concerned, it is the polluter who is *prima facie* the wrongdoer or tortfeasor, and therefore potentially liable and the one who has suffered a loss or damage is entitled to a commensurate remedy.

The object of a remedy is rooted in the Roman law principle of *restitutio in integrum* which basically means putting the plaintiff or claimant in the same position as he would have been if the wrong-doer had not inflicted on him the alleged damage. Here, in terms of the common law and the English language, whereas "damage" used in the singular denotes loss, injury or harm, "damages" in law is not the plural of "damage".[162] Rather it means "compensation" which is the word used in the civil law jurisdictions and in private maritime law conventions; and is universally recognized as the principal type of remedy in tort cases including pollution damage. The victim of pollution damage is thus entitled to receive damages or compensation as a remedy from the liable polluter. It is stated by one author that "the claimant is entitled to damages simply on the basis of damage or interference".[163]

One aspect of legal theory in the context of ship-source pollution law is the so-called functional approach to law-making espoused by Professor Mukherjee, and in his observation, exemplified in domestic pollution legislation by the Canadian Arctic waters Pollution Prevention Act, 1970[164] and in international convention law by the Fund Convention elaborated below in this chapter. In his view, the functional approach to law-making arises when the existing law is non-existent or inadequate to meet the envisaged policy objectives, and a deviation from the normal route is needed to reach the intended destination in the expectation that the deviated route will eventually become the law.[165]

---

[161] *Ibid*.

[162] See Anthony I. Ogus, *The Law of Damages*, London: Butterworths, 1973.

[163] Geoffrey Samuel, *Law of Obligations and Remedies*, Second Edition, London: Cavendish Publishing at p. 92.

[164] R.S.C. 1985, Vol. II, c. A-12.

[165] Gleaned from personal discourses with Professor Mukherjee as his student at Dalian Maritime University. He acknowledged his indebtedness to the late Professor Douglas M. Johnston of Dalhousie University Law School who was a leading scholar on this topic.

4.3. Liability in Ship-Source Pollution Law: Nature of Claim, Sources of Law and Basis of Liability

The following discussion proceeds on the premise of liability and compensation or damages as the two essential parameters of private law in the field of ship-source pollution, and their interrelationship. In this context it is recognized that such liability mainly arises in cases of oil spills caused by accidents otherwise referred to as accidental pollution. However, operational pollution, that is, pollution arising from the normal operations of ships can also be quite substantial. Whether and to what extent pollution damage is attributable to such operations is a question of fact for purposes of establishing civil liability and seeking commensurate compensation. The point to be made is that the same legal principles apply in respect of liability and compensation regardless of whether the pollution in question is accidental or operational.[166] But in practical terms, pollution damage in cases of operational pollution is not easily identifiable as in cases of accidental spills.

Pollution damage is a maritime tort and a claim for pollution damage is therefore a tortious claim or a claim *ex-delicto*. As elaborated below, liability in tort is *prima facie* based on fault. A claim in tort in a common law jurisdiction is likely to be entirely based on case law jurisprudence which is the source of the law. By contrast, in a civil law jurisdiction, the law for a claim in delict would be drawn from legislation such as the Civil Code. In China, there is specific legislation known as the Tort Law on which a pollution claim will be based. Notably, there is a Marine Environment Protection Law (MEPL) in China, but that legislation deals primarily with regulatory marine pollution law. It is recognized, however, that today almost all the private law in this field is convention-based. Conventions are usually given effect through national legislation. Thus, a claim may be based on the common law of torts in a common law jurisdiction with or without the benefit of convention law; it may be based on national legislation typically in a civil law jurisdiction where no convention applies, or in a common law jurisdiction under a statute giving effect to a convention; or in rare cases, directly on a convention. The general principles of tort law are presumed to be subsumed within conventions except that the basis of liability is strikingly different as seen in the discussion below.

As mentioned above, fault-based liability is the prevailing norm in the law of torts, regardless of the legal system; whether it is common law or civil law. Without proof of fault there can be no liability and therefore, no recourse by way of a remedy for

[166] Gotthard Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage*, Chichester: John Wiley & Sons, 1997, at p. 32.

the plaintiff regardless of how vile the defendant's conduct may be otherwise.[167] Fault, at least at common law, comes in different shapes and sizes identified according to the nature of the tort. Thus, in the context of the field of law under discussion, *i.e.,* ship-source pollution liability, fault may be in the form of the tort of trespass, nuisance or negligence which the plaintiff must prove on a balance of probabilities.[168] The plaintiff must also prove that the fault of the defendant was the proximate cause of the loss or damage suffered by him.[169]

As liability stems from loss or damage, an important point to be noted with regard to pollution damage is that even though it is primarily physical or tangible, there is also an intangible dimension to it such as loss of enjoyment of environmental amenities. Whether in respect of such intangibles the law supplies a remedy, and the nature of it, is a valid and important consideration addressed later in this chapter. It is particularly relevant to the question of who should remunerate the salvor for protecting the marine environment in a pollution incident. The law respecting the three torts mentioned above are derived from the maritime jurisprudence in the common law. Fault-based liability in respect of oil spill damage was upheld by the House of Lords in the classic case of *Southport Corporation* v. *Esso Petroleum Co. Ltd.*[170] This decision is still considered to be the foremost authority in the common law domain outside the realm of convention law. Basically, if a plaintiff claimant fails to prove fault on the part of the defendant polluter, he is out of luck. Incidentally, in the civil law system the common law concept of fault is expressed by the term "*culpa*" derived from the Latin.[171]

Meanwhile it must be pointed out that in the sphere of ship-source pollution, it is strict liability that prevails as opposed to fault-based liability, but arguably this basis of liability resides only in the convention law as discussed below. As a counter-argument it is submitted that the origin of strict liability is the famous case of *Rylands* v. *Fletcher*,[172] a non-maritime decision of the House of Lords from which the notion is said to have been derived. The rationale for strict liability in that case

---

[167] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Third edition, Berlin Heidelberg: Springer-Verlag, 2013 p. 298.

[168] See also P.K. Mukherjee and R.S. Lefebvre, "Fishermen and Oil Pollution Damage: The Regimes of Compensation", *Proceedings: International Research Symposium on Labour Developments in the Fishing Industry*, University of Quebec at Rimouski, P.Q., November 3-4, 1983 pp.73-81, published by Department of Fisheries and Oceans, Canada.

[169] W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 16th. Edition, London: Sweet & Maxwell, 2002. See generally chapter 5.

[170] [1956] A.C. 218 (H.L.).

[171] Brian Smith, *State Responsibility and the Marine Environment: The Rules of Decision*", Oxford Clarendon Press, 1988 at pp. 12-15.

[172] [1968] L.R.3 (H.L.) 330.

rested on the fact that the damage suffered by the plaintiff was caused by the escape of harmful substances incidental to an "extra-hazardous activity". Assuming there is no difference in substance between "extra-hazardous" and "ultrahazardous", the rule is stated as follows:

> One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.[173]

From the above can be derived the statement that an activity is considered to be ultrahazardous if (a) it necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.[174] Another description of the phenomenon is manifested in the alternative appellation “abnormally dangerous” to justify the imposition of strict liability. The factors to be considered in determining what activity is “abnormally dangerous” include the degree of risk of harm and its gravity, possibility of elimination of the risk through reasonable care, its common usage, appropriateness with regard to the place of the activity and its value to the community.[175]

A subtle point that must be emphasized is that it is the consequences or effects of the activity that determine whether it is ultrahazardous, extra-hazardous or dangerous. The danger involved in the carrying out of the activity is not the qualifying factor. That is a matter for regulatory law, which again in the shipping context, is largely promulgated through international conventions and related treaty instruments.[176] Strict liability for pollution damage is now universally recognized as the norm in all spheres of the environment and is stated to be derived from the English law on the tort of nuisance.[177] In terms of air or atmospheric pollution, the leading case is the *Trail Smelter Arbitration* (*United States* v. *Canada*)[178] In this

---

[173] American Law Institute, *First Restatement of Torts*, § 519 cited in Cecil A. Wright and Allen M. Linden, *Canadian Tort Law*, Sixth Edition, Toronto: Butterworths, 1975, at p. 559.

[174] Cecil A. Wright and Allen M. Linden, *Canadian Tort Law*, Sixth Edition, Toronto: Butterworths, 1975, at p. 559.

[175] See §§ 519 and 520 of American Law Institute, *First Restatement of Torts* cited in Cecil A. Wright, Allen M. Linden and Lewis N. Klar, *Canadian Tort Law*, Ninth Edition, Toronto & Vancouver: Butterworths, 1990, at p. 14-12.

[176] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Third edition, Berlin Heidelberg: Springer-Verlag, 2013 at p. 298.

[177] Gotthard Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage*, Chichester: John Wiley & Sons, 1997, at p.19.

[178] 3 UN Rep. on Intl. Arbitration Awards, 1905.

case which involved inter-state arbitration proceedings, it is apparent from the report of the case that strict liability was the basis.

Another liability basis with regard to activity leading to highly dangerous or even devastating effect, or environmentally harmful to an extraordinary degree is the notion of absolute liability. Perhaps this is best illustrated by citing the example of the Nuclear Convention of IMO expressly provides for absolute liability but no definition of the term is given.[179] In terms of domestic law, the Arctic Waters Pollution Prevention Act of Canada[180] is exemplary of absolute liability in respect of the Arctic waters north of the 60th parallel of latitude where a zero-discharge regime is in place. In waters south of that parallel, the discharge regime is in line with MARPOL and the liability regime for damage caused is strict liability in line with the CLC 1992 to which Canada is a party.

A question that arises immediately is whether and how different is absolute from strict liability. In terms of the "no-fault" variety, it is submitted that there are two layers of liability, one lying at a higher threshold of severity than the other. Absolute liability is distinctive in that sense and is accepted as the norm where the consequences of the damage are perceived to be more serious than under strict liability. One important characteristic of the strict liability regime is that it provides for defences such as act of God or *force majeure* as well as instances where a person other than the defendant may be liable for the pollution damage. In contrast, absolute liability, as the name would imply, provides for no defences. This point of view may be imprecise to the extent that the liability may not be as "absolute" as it may seem to be at first sight. It has been opined, for example that strict liability "… differs from absolute liability only in the greater range of exculpatory factors which may negative responsibility".[181]

The discussion above on the nature of the claim and the basis of liability is as much a question of legal theory as the elements mentioned under 4.2, as it is a matter of substantive law, particularly where it pertains to the shipowner's legal position as a polluter *vis a vis* a salvor providing environmental protection services and thereby assisting the shipowner who is obliged to remunerate him. Notably, as polluter, the shipowner is subject to strict liability in so far as the pollution victim is concerned, but in any dispute between him and the salvor, liability would be on the basis of fault under contract law or principles of salvage law. Understanding the implications of the private law of ship-source pollution is thus of crucial importance.

---

[179] Civil Liability for Maritime Carriage of Nuclear Material Convention, 1971.

[180] R.S.C. 1985, Vol. II, c. A-12.

[181] Patricia W. Birnie and Alan E. Boyle, *International Law & the Environment*, Oxford University Press, 2nd Edition, 2002, at p. 184.

4.4. Pollution Liability

4.4.1. Pre and Non-Convention Law

Tort law encompasses determination of liability and corresponding remedies which primarily comprise damages, otherwise referred to as compensation in civil law jurisdictions and in international convention law. It is this law that governs ship-source pollution liability in states that are not parties to the relevant international conventions. This is particularly important given that in the convention regimes, the basis of liability is quite different. This is also the law that prevailed before the first convention, namely, the CLC, was adopted. The pre-convention law in common law jurisdictions is largely based on case law jurisprudence which is also the law that continues to apply in non-convention common law states although there are only a few cases that serve as precedents. Because case law does not feature in civil law jurisdictions, the law of delict as found in the civil codes is the applicable law in non-convention civil law jurisdictions. In China, for example, the Tort Law would be the applicable legislation. This is briefly addressed below in view of the fact that China is not a full subscriber to the CLC/Fund package.[182]

The focus in this discussion is on the common law approach mainly because the conceptual parameters of liability can be exemplified and explained through the case law. The principles of tort law provide the foundation for imposition of liability. A victim of pollution damage may well allege unjustifiable interference with the possession and enjoyment of his property by the polluter.[183] Three varieties of torts are relevant in this connection; namely, trespass, nuisance and negligence. Incidentally, the illustrious Lord Denning M.R. in the Court of Appeal in *Southport Corporation* v. *Esso Petroleum Co. Ltd.*[184] rendered a classic textbook rendition of the torts of trespass, nuisance and negligence.

The first tort that warrants mention is trespass which is said to be actionable *per se*. At common law, the law of trespass is entirely based on case-law. In *Entick* v. *Carrington*,[185] Lord Camden L.C.J. held that – "By the laws of England every invasion of private property, be it ever so minute, is a trespass". In other words, any unjustifiable interference regardless of whether or not there was damage, gives rise to an action in trespass. He continued – "No man can set foot upon my ground without any license but he is liable to an action, though the damage be nothing;

[182] China is a state party to the CLC 1992 but not the Fund Convention 1992.

[183] Christopher Hill, *Maritime Law*, 6th. Edition, London: LLP, 2003, at p. 419.

[184] [1955] 2 Lloyd's Rep 655 (C.A.).

[185] (1765), 19 State Trials 1029, Common Pleas.

which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass or even treading upon the soil".[186] Notably, this is in sharp contrast with the notion of strict liability where the converse is true, namely, that the plaintiff need only show damage; there is no need to prove fault. But the plaintiff must show that the defendant's act of trespass was the direct cause of the damage. In the marine pollution context this can be exemplified by a leaking tanker spilling oil directly on to a fisherman's boat resulting in the boat sinking as opposed to the boat and its equipment being damaged indirectly by the oil emanating from a leaking tanker floating on the water surface and striking the fishing boat.

Originally in English law, in the absence of directness, the courts recognized actionability only on a case by case basis. Such an action was referred to as "trespass on the case" or "action on the case" or "case", which eventually came to be known as the tort of nuisance.[187] This tort comprises a public and a private dimension. Public nuisance is actionable as a tort only to the extent that the plaintiff can show that he suffered damage in excess of that suffered by the public in the vicinity where the damage occurred. The tort of private nuisance constitutes "unjustifiable interference with the use and enjoyment of land" and may well apply to ship-source pollution where a dock, wharf or any other land area of the plaintiff suffers pollution damage attributable to a ship.[188] As held in *The Wagon Mound*[189] the plaintiff must show that the defendant had reasonably foreseen the damage attributable to the nuisance.

As regards the tort of negligence, Lord Denning held in his Court of Appeal decision in *Southport Corporation* v. *Esso Petroleum Co. Ltd*.[190] that it was the most appropriate ground for liability for pollution damage. Prior to the decision of the House of Lords in *Donaghue* v. *Stevenson*,[191] there was no readily identifiable and established law of negligence in England. The common law only recognized actions in contract, or, where there was a fiduciary nexus such as within the purview of trust, was an action cognizable at law. Lord Atkin in the House of Lords delivered the classic judgment which has remained the cornerstone of the law of negligence

---

[186] See Cecil A. Wright, Allen M. Linden & Lewis N. Klar, *Canadian Tort Law*, 9th Ed., Toronto & Vancouver: Butterworths, 1990, at p. 2-39.

[187] William L. Prosser, *Handbook of the Law of Torts*, Fourth Edition, West Publishing Company, 1971; Cecil A. Wright, Allen M. Linden & Lewis N. Klar, *Canadian Tort Law*, 9th Edition, Toronto & Vancouver: Butterworths, 1990, at p. 2-39; W. V. H. Rogers, *Winfield & Jolowicz on Tort*, 16th Edition, London: Sweet & Maxwell, 2002, pp. 45-46, section 2.2.

[188] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Third edition, Berlin Heidelberg: Springer-Verlag, 2013 at p. 298. at p. 300.

[189] [1961] 1 Lloyd's Rep. 1 (P.C.).

[190] [1955] 2 Lloyd's Rep 655 (C.A.).

[191] [1932] A.C. 532.

ever since. He laid down the rule requiring the plaintiff to prove that the defendant owed him a duty of care, that he was in breach of that duty, that the plaintiff suffered a loss or damage and that the breach was the proximate cause of the damage. To these four ingredients was added a fifth established by the Privy Council in *The Wagon Mound* cases,[192] that is, the requirement of reasonable foreseeability. To succeed in the action, the plaintiff would have to show that the defendant had reasonably foreseen the consequences of his breach.

To sum up, even today in common law jurisdictions where the convention law is not applicable because the state where the ship-source pollution occurred is not a party to the relevant convention, the *Southport* case together the *The Wagon Mound I and II* would stand as authorities for cases outside the domain of conventions.

4.4.2. Convention Law

Ship-source pollution having serious international ramifications, the need for universality in terms of a legal regime is obvious. It is recognized in this context that international treaty instruments are the best way to achieve this universality, otherwise referred to as "uniformity or unification". Whatever might be, the appellation used to describe this phenomenon must be recognized that the same objective may be reached through different ways depending on the legal system followed. Therefore, it is submitted that the term "harmonization" used by the IMO is the most appropriate way to describe this phenomenon.[193]

Internationally, outside the United States regime, all aspects of ship-source pollution, regulatory as well as private law are governed by convention law. The private law convention regime dealing with liability and compensation for ship-source pollution damage is quite comprehensive and holistic going beyond oil into the sphere of hazardous and noxious substances. Following the 1967 grounding of the Liberian super tanker *Torrey Canyon* on Seven Stones Reef off the southwestern coast of England and the ensuing oil spill, IMCO, as it was then called, went into action by convening a diplomatic conference in Brussels in 1969.[194] Two conventions, one on public law and the other on private law, were adopted at the

[192] [1961] 1 Lloyd's Rep. 1 (P.C.).

[193] Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002 at pp. 144-145.

[194] The original name was Intergovernmental Maritime Consultative Organization bearing the acronym IMCO. In 1981, the name was changed to International Maritime Organization (IMO). Details of the grounding disaster are found in Cmnd. Doc. No. 3246 (1967) - Secretary of State for the Home Department, "The *Torrey Canyon*". See also the seminal article by Edgar Gold, "Pollution of the Seas and International Law, (1971), 3 *JMLC* 13 at pp. 21-22.

conference. These were the Intervention Convention[195] and the Civil Liability Convention (CLC 1969)[196]. In the present context, we are only concerned with the latter. At the conference, the basis of liability which concerned the registered shipowner and his third-party liability insurer, the P&I Club, was agreed to be strict, subject to a number of exceptions or defences including act of God. There was provision for the shipowner to limit liability subject to the requirement for compulsory third-party liability insurance characterized as "evidence of financial responsibility".

The CLC 1969 was initially fraught with difficulties. If the "polluter pays" principle were to be applied, the question would be - who is the polluter? Should liability be borne exclusively by the shipowner or should the cargo owner also bear at least a part of the liability to pay compensation to pollution victims? The cargo side argued that there was no extant law under which they could be held liable since the shipowner is the one in possession and control of the cargo while it is on board his ship. He is therefore liable as custodian of the cargo. The other side argued that the nature of the cargo as a potential pollutant must be considered, and in that respect, the cargo owner should also be liable. Had the cargo not been oil, there would have been no pollution damage. Therefore, the oil industry should at least bear some moral responsibility.

After intense deliberations, the international community came up with a device under which a fund was constituted which was to be financed through a levy imposed on the oil industry. Although there is no mention of "functionalism" or "functional approach" in any documents of the IMO, this was indeed an example of legal functionality; an approach taken by the international community to reach a desired result. Although initially, the concept itself did not have a legal base, the deliberations at IMO led to the adoption of the Fund Convention[197]. In effect, therefore the functional approach was transformed into a convention instrument. It was a solution outside the bounds of the existing law. Through the effectuation of this convention, the responsibility of the cargo owner was legitimized as binding law.[198]

In 1992 both the CLC and Fund Convention were amended through Protocols. The revised instruments represented a package and came to be known as the 1992

---

[195] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention), 1969, 9 *ILM* 25.

[196] International Convention on Civil Liability for Oil Pollution Damage, 1969, 973 *UNTS* 3

[197] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

[198] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Third edition, Berlin Heidelberg: Springer-Verlag, 2013 at p. 305.

Conventions in their own right. They were no longer Protocols to the 1969 and 1971 Conventions. While there is no compulsion on a state party to the CLC to also be a party to the Fund Convention, the converse is not true. That is the case with China which is a party to the CLC but not to the Fund Convention. However, a state that is not a party to the CLC cannot singularly become a party to the Fund Convention.

Among others, the package brought about two significant changes. One was the geographical scope of application of both conventions which were expanded from the original 12 nautical miles, that is, the outer limit of the territorial sea to 200 nautical miles, which is the outer limit of the exclusive economic zone (EEZ) under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). It is notable in this context that unlike the typical flag state conventions of the IMO, the application of the CLC and Fund Convention are "site specific". In other words, only if the location of the oil spill is in a state party to the convention will the convention apply, regardless of whether or not the flag state of the ship is a party. The other major change was the substantial raising of the combined limits of liability under both conventions.

The other salient features of the "package" include the following:

The CLC applies primarily to laden tankers, *i.e.*, tankers carrying oil in bulk except that it may apply to a combination carrier on ballast if on the previous voyage it carried oil in bulk and residues remained on board. Pollution from oil in the bunkers of a laden tanker is covered by the convention. Only persistent oil is covered so that non-persistent oils such as gasoline, kerosene and aviation fuel are outside the scope of the convention. There is provision for all claims to be channeled through the registered shipowner. The shipowner's right to limit liability has already been mentioned. However, he may stand to lose that right if the pollution damage results from "his personal act or omission committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". This test was a dramatic change from the previous "actual fault or privity" test under which the onus was on the shipowner to show that he was entitled to limit liability. Under the new test the onus has now shifted to the claimant who has to prove his case against the defendant shipowner and also prove that the shipowner is not entitled to limit liability, which in effect is a two-prong burden of proof for the claimant to bear. Incidentally, the wording of the new test is such that it is virtually unbreakable. It was inserted in the new convention at the behest of the insurance industry who wanted a watertight provision in the interest of certainty as to the quantum of liability so that commensurate premiums could be charged.[199] The same test applies to servants and agents of the shipowner and to salvors or their servants

[199] Proshanto K. Mukherjee, "Essentials of the Regimes of Limitation of Liability in Maritime Law", *The Admiral*, Vol. IV, Accra: Ghana Shippers' Council, Unik Image, 2009, pp. 39-57.

and agents who would all be otherwise precluded from being subjected to any pollution claims.

The Fund Convention was established as a companion instrument to the CLC. Basically, it is the legal vehicle through which the International Oil Pollution Compensation Fund (IOPC Fund) has been established. The Fund itself, under the convention is an entity with legal personality capable of suing and being sued in its own name.[200] The mechanics of the Fund's operation include provision of compensation to victims of pollution damage where the monies subject to the limits of liability under the CLC are unavailable for various reasons including the insolvency of the shipowner, or one or more of the CLC defences have been successfully invoked by him, or they are inadequate to meet the total amount of compensation claims. In such circumstances, compensation monies available under the IOPC Fund are utilized up to the limits of liability of that convention. The so-called "unit of account" for limitation of liability is expressed in terms of the special drawing rights (SDR) of the International Monetary Fund (IMF) which is a notional unit consisting of a basket of major currencies. Thus, the liability of the IOPC Fund starts where the liability under the CLC ends. The upper limit of the combined limitation packet is 203 million SDR.

If the convention package is viewed holistically, it appears that the IOPC Fund as a source of compensation is akin to insurance. Whereas the obligation to compensate under the CLC is that of the registered shipowner backed by his P&I Club under the compulsory insurance provisions of the convention, the corresponding obligation under the Fund Convention falls to be met by the oil industry as owners of the pollutant cargo.

There is also a third tier of compensation available to claimants beyond the limits of the Fund Convention proper through the Supplementary Fund Protocol, 2003.[201] At present, the available compensation is up to a maximum of 750 million SDR including the 203 million SDR available under the CLC/Fund 1992. The Protocol is in force although only a few states are parties to this instrument. There are two other conventions relevant to liability and compensation in respect of ship-source pollution. One is the so-called Bunkers Convention which covers pollution caused by fuel oil carried in the bunkers of a non-tanker.[202] There is no separate limitation regime for this convention; state parties are expected to adopt their own under

[200] Jingjing Xu, "The International Legal Framework Governing Liability and Compensation for Ship-source Oil Pollution Damage", in Maximo Q. Mejia, Jr. *Selected Issues in Maritime Law and Policy,* New York: Nova Science Publishers, 2013 at p.112.

[201] Protocol Establishing the International Oil Pollution Supplementary Compensation Fund (IOPSCF or SCF) IMO Doc, LEG/CONF.14/20.

[202] International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers), 2001, 40 *ILM* 1493.

domestic legislation following the model of the LLMC 1976 and it 1996 Protocol.[203] The other is the Hazardous and Noxious Substances (HNS) Convention, 1996 and its Protocol of 2010, together now referred to as the 2010 HNS Convention. It has not yet entered into force.[204] The HNS Convention consists of a combination of two tiers; the first dealing with shipowner liability and the other establishing the HNS Fund financed by the owners of HNS cargo. Notably this convention regime consists of an environmental as well as a safety factor in view of the nature of the cargo. Its scope of application is therefore different from the CLC/Fund drawing in both the coastal state in relation to the location of the incident as well as the flag state of the ship carrying the HNS cargo.

In the latter part of this chapter which addresses the "compensation" component of the equation, the CLC/Fund 1992 package serves as the principal reference point. The author does not deem it necessary or expedient to delve any deeper into the other private law ship-source pollution conventions in view of the fact that the basic legal principles are the same particularly in the context of the correlation between ship-source pollution law and salvage law which is germane to this thesis.

4.4.3. Unilateral Approach of the United States

It is often said that in the realm of international ship-source pollution law there are three regimes in place. The convention regime is, of course, the most comprehensive and predominant. Common law jurisdictions which are non-parties to conventions - there are a few remaining - apply the fault-based liability principles of tort law; similar non-convention civil law jurisdictions simply apply their respective codes governing the law of torts such as China where the Tort Law is applicable in such cases. The third dimension is the domestic legislative regime of one jurisdiction in particular, the United States. The legislation in question is the infamous Oil Pollution Act, (OPA 90) which was introduced unilaterally without heed to any international convention in private or regulatory law.[205] It is described as "international" for a number of reasons, not the least of which is the fact that the

[203] International Convention on Limitation of Liability for Maritime Claims, 1976, 1456 *UNTS* 221 and it Protocol of 1996, 35 *ILM* 1433.

[204] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996, 35 *I.L.M.* 1406; and Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (2010 HNS Protocol), available at the official HNS Convention website, http://www.hnsconvention.org/fileadmin/IOPC_Upload/hns/files/2010%20HNS%20Protocol_e.pdf

[205] For a good explanation and critique of OPA 90, see Gotthard Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage*, Chichester: John Wiley & Sons, 1997.

United States is one of the top two trading nations in the world in terms of importation of oil which makes the marine environment vulnerable to ship-source pollution. The other point to emphasize is that the United States is not a party to any international ship-source pollution convention but rather it is the home-grown OPA 90 which governs all marine pollution matters within the maritime jurisdiction of the country. In that sense it is in practical terms a third international regime for ship-source pollution since foreign ships are subject to that legislation when operating in waters in or near the United States.

The *Exxon Valdez* oil spill of 1989 in Alaska was the impetus for the enactment of OPA 90 which seems to sit well with the American public at large but is correspondingly unpopular with the international shipping community, in particular those involved in various aspects of the inbound and outbound tanker traffic. The impact on the international maritime community involved in the business of shipping oil into the United States was manifested in the early years of the legislation when Protection and Indemnity (P&I) Clubs as third-party liability insurers were reluctant to cover oil tankers in the U.S. trade. This was in reaction to the perception that OPA 90 was an unlimited liability regime which at the time emerged as the most criticized feature of the legislation. A close examination reveals that in theory this is fallacious because there is indeed provision for limitation of liability. But in practice it seldom works due to the denial of limitation rights under the legislation in the event of any violation of a statutory provision. Such violation is inevitable given that any spill or discharge of oil, accidental or otherwise, is prohibited under the statute. Hence the allegation that OPA 90 is an unlimited liability regime given that limitation is so easily breakable. However, the reluctance of the major international P&I Clubs to provide cover to oil tankers going to the United States eventually dissipated. Some of it was due to competition from small-scale market underwriters locally based in the United States in the face of which the major players decided to change their stance. Furthermore, the federal legislation does not preclude the adoption of more stringent measures by individual states within the U.S. through state legislation on the subject.[206]

Another important feature of OPA 90 is the compulsory requirement for oil tankers built after 1995 entering waters under the jurisdiction of the United States to have double-hull construction. This today is inconsequential as there are similar requirements in the international regime under MARPOL even though there is still controversy among technical and engineering experts regarding the utility and viability of the double-hull concept.[207] Be that as it may, from the point of view of salvors providing environmental services, whether or not a tanker is double-hulled,

[206] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Third edition, Berlin Heidelberg: Springer-Verlag, 2013 at p. 298. at pp. 319-320.

[207] *Ibid*.

is an important factor which impacts on the environmental services they can perform and the remuneration they can earn.

4.5. Compensation

4.5.1. Compensation as a Remedy

Compensation is a kind of remedy and invariably the most important one which begs the question as to what is remedy in legal terms. Suffice it to say in the first instance that it is a legal metaphoric term for the word "cure" in ordinary parlance. More specifically, it is a cure for a legal wrong suffered by a person and is the private law counterpart of punishment or penal sanction in public law. In terms of the generic term "sanction" to describe this phenomenon, it can be said that remedy is a sanction in private law. As mentioned earlier, the general legal principle derives from the Roman law doctrine of *restitutio in integrum* which encapsulates the two dimensions of the concept requiring the wrong-doer defendant to provide restitution to the plaintiff who has suffered the wrong, and to do it in full. It is also mentioned that "compensation" in terms of convention jargon is virtually synonymous with "damages" in the common law system. Undoubtedly, compensation is the most functional and expedient remedy for pollution damage and is the one primarily considered in this discussion. The CLC/Fund Convention package provides the premise or reference point for the present discussion, the rationale being that the basic principles contained in the HNS and Bunkers Conventions stem from those already entrenched in that package. However, domestic law peculiarities are inevitably factored into the equation in reference to the case law featuring the conventions which are discussed briefly.

4.5.2. Role of Domestic Law and IOPC Fund Decisions

An important observation in this regard is that in many instances domestic law is indispensable in situations that are not covered by the conventions or where the convention regime expressly or impliedly looks to domestic law for coverage of an issue. This state of affairs can be problematic because of potential lack of uniformity in the application of the conventions in different jurisdictions that are state parties. Civil and common law jurisdictions may have different viewpoints regarding the same issue or aspect leading to uncertainty in the application of the law from a global perspective.

This again is compounded by the addition of the so-called "Fund jurisprudence" to an already complex scenario. Fund jurisprudence refers to decisions on

"admissibility of a claim" rendered by the IOPC Funds through the persona of the Director for compensation under the Fund Convention. Incidentally, courts do not recognize such decisions which have been judicially held to have no binding effect legally and are irrelevant.[208] On the other hand, scholars have stated that this view may be an oversimplification and that in some instances Fund criteria may have some legal effect whereas in others they may only have persuasive effect.[209] Another author has pointed out that in as much as the admissibility criteria of the Fund may have implications for itself, Fund decisions "are themselves subject to the judicial control of the courts in member jurisdictions".[210] In sum, the practical effect of Fund decisions is not to be discounted even though they are appealable to domestic courts.

4.5.3. Pollution Damage and Preventive Measures

Against the above background, it is necessary to gain an appreciation of the notion of compensability particularly in the context of the conventions. The basic question raised is whether all forms of loss, damage, harm and injury are compensable in general and under ship-source pollution law in particular. The answer in the first instance must be in the negative in both cases. Before proceeding further, it must be noted that under the conventions, only loss, damage, harm or injury that qualifies as "pollution damage" by definition is compensable. Thus, in terms of convention law, "pollution damage" is virtually synonymous with "compensable damage" in ordinary legal parlance. The convention definition of "pollution damage" which one author considers to be unduly complex and unclear[211] reads as follows:

---

[208] *Landcatch Ltd*. v. *International Oil Pollution Compensation Funds*; [1999] 2 Lloyds Rep. 316 at p. 327 per Cullen L.J. of the Court of Session Inner House.

[209] Colin De La Rue and Charles B. Anderson, *Shipping and the Environment Law and Practice*, Second Edition, London: Informa Law, 2009 (hereunder referred to as "De La Rue & Anderson"), at p. 368.

[210] B. Soyer, "Ship-sourced Oil Pollution and Pure Economic Loss: The Quest for Overarching Principles", Torts Law Journal, 17, 2009 at pp. 275-276.

[211] Proshanto K. Mukherjee, "Liability and Compensation for Environmental Damage Caused by Ship-Source Oil Pollution: Actionability of Claims in Michel G. Faure, Han Lixin and Shan Hongjun (Eds.) *Marine Pollution Liability and Policy: China, Europe and the U.S*., The Netherlands: Wolters Kluwer, 2010, at pp. 77-80.

> "pollution damage" means (1) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken, and (2) the costs of preventive measures and further loss or damage caused by preventive measures.[212]

Indeed, there are several elements in the definition that warrant separate and detailed examination. At present, it suffices to look at one element which constitutes pollution damage; it is the one that reads "the costs of preventive measures and further loss or damage caused by preventive measures".[213] This element is germane to the central theme of the investigation in this thesis as it pertains to preventive measures undertaken by salvors, and the extent to which they may be entitled to recover those costs from the IOPC Fund as a pollution damage claim. It does not refer to the loss or damage itself caused by pollution but rather to the costs incurred by the claimant to try to prevent it. As well, costs incurred for further loss or damage resulting from the preventive measures are included which seem to assume that preventive measures will generate further loss or damage. In the view of this author, the assumption rather should be that further loss or damage will occur only if in the first place the initial measures were not taken with due care by the claimant. In those circumstances should the defendant polluter be held liable for the costs incurred? At any rate, the issue remains as to whether those costs belong to the same genre as loss or damage to be compensable. The next issue arising from the above provision leads to the next question, namely, what constitutes preventive measures? This is to be found in the definition of that term which reads-

> "preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

Clearly, "any person" in the above definition could very typically be in reference to a salvor and the measures would involve operations pertaining to environmental protection. Indeed, it is submitted that whether or not a salvor is under a duty, contractual or otherwise, such as under customary law, if he takes measures to prevent or minimize pollution damage, he should be entitled to compensation for the costs incurred as "costs of preventive measures" embedded in the definition. This proposition is also germane to the central theme of this thesis. Ordinarily and primarily, salvors rely on salvage remuneration under the Salvage Convention and LOF. But there may be occasions when the salvage regime may not be applicable, or no effective remedy may be available to the salvor, such as for example, where

[212] CLC 1992, Article 2 paragraph 6.

[213] Article 2 paragraph 6 (b) of CLC 1992.

the shipowner is insolvent or negatively disposed *vis a vis* his liability insurer. In such circumstances, he may seek compensation by invoking the "costs of preventive measures" provisions under ship-source pollution conventions.[214]

It is notable that the Executive Committee of the IOPC Fund in deciding whether to provide compensation under the Fund Convention for preventive measures taken by a salvor in the *Patmos* case, referred to the so-called "primary purpose" test in the following words:

> ...operations could be considered as falling within the definition of *preventive measures* only if the primary purpose was to prevent pollution damage; if the operations primarily had another purpose, such as salvaging hull or cargo, the operations would not be covered by the definition.[215]

Incidentally, the IOPC Fund also used this test in 1991 in the *Rio Orinoco* case.[216] Another approach adopted by the IOPC Fund is known as the "dual purpose" approach. It is recognized that in most cases of salvage operations taking place in connection with an oil spill or other marine environmental incident, salvors will carry out both salvage of property as well as attempt to prevent or mitigate environmental harm. In such instances, it may not always be possible to separate the two kinds of operations to establish whether the primary purpose of the salvor's actions was to prevent or mitigate pollution, or to salve property of the shipowner or cargo owner. In the *Agip Abruzzo* case, the IOPC Fund decided to add up all the costs incurred and carried out an apportionment exercise to determine how much of the costs were attributable to property salvage and how much to pollution prevention and mitigation.[217]

It appears that in exercising its discretion, unless the case goes to court, the Fund feels free not to be dictated by any Salvage Convention criteria for salvage awards or the provisions of LOF, and may include in the costs claimed by the salvor, an element of profit that the Fund considers fair and equitable. As noted above, an essential ingredient in the computation of salvor's costs for compensation purposes is reasonableness of the preventive measures undertaken. One distinguished author has commented that measures taken pursuant to LOF are quite reasonable and there is no need for the IOPC Fund to formulate its own criteria for calculating salvors' costs. In this way, shipowners would be encouraged to engage salvage services in

---

[214] De La Rue & Anderson, at p. 567.

[215] IOPC Fund Annual Report, 1988 at p.60.

[216] See FUND/EXC. 28/9, 8 October, 1991, §3.3.2.

[217] See FUND/EXC 30/5, 17 December 1991, § 4.2.3.

the event of an oil spill.[218] Be that is it may, undoubtedly the salvage industry along with the marine insurers' lobby feel quite content with the IOPC Fund's policy in this regard as it fits in with their demands for better terms in respect of being adequately remunerated for their efforts in instances of provision of environmental protection services. This theme will be pursued further in the next chapter of this thesis.

Returning now to the definition of "pollution damage" two points are to be noted. One is that it has remained unchanged since it was drafted for the original CLC of 1969 even though the definition of "pollution damage" to which it is inextricably linked has undergone drastic changes. The other point of observation is that the word "incident" is also a defined term and that in the 1992 version of CLC it has been enlarged from its initial 1969 version. In the initial version it was defined as "any occurrence or series of occurrences having the same origin, which causes pollution damage"; and in the current 1992 version, the words "or creates a grave and imminent threat of causing such damage" have been added at the end. The legal implication of the expanded definition is that the convention concept of what is pollution damage has been further convoluted by stretching it to "preventive measures" taken after an incident which may not actually cause "pollution damage" as defined but simply have the potential for causing damage by creating a "grave and imminent threat". In all these instances, compensation will be payable under the convention(s). In other words, costs incurred for preventing a grave and imminent threat of pollution is compensable under the guise of "pollution damage".

4.5.4. Property Damage

A tangible item of compensability is damage to property which almost invariably qualifies as "pollution damage" to be compensable. This is best illustrated by one of the prime categories of claimants, in ship-source pollution cases, namely, fishermen. The livelihood of the typical subsistence fisherman is dependent on his occupational property consisting of his boat, nets, trawls, navigational equipment and machinery for powering his vessel and personal belongings on board. Loss of or damage to any of these will attract compensation under the CLC/Fund package so long as the condition in the definition of "pollution damage" requiring the loss or damage to occur outside the polluting ship is met.[219]

Among the various ways in which a pollution victim's property can suffer damage is through physical contact of the property with the spilt oil floating on the surface

[218] Gotthard Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage*, Chichester: John Wiley & Sons, 1997, at p. 38.

[219] Article 2 paragraph 6(a) of CLC 1992 refers *inter alia*, to "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship".

of the sea. This is most common with regard to property at sea where the pollution occurs, such as other vessels including ships, boats, rafts and the likes as well as navigation marks such as buoys, beacons and light vessels.

Damage to property ashore is equally common, which include wharves and jetties as in the case of *The Wagon Mound I,*[220] shorefront businesses such as hotels, resorts and restaurants, private homes, public recreational facilities, *etc*. Damage to land such as the foreshore, beaches and other natural features on land including trees and other forms of organic life may also count as property and at the same time, as elements of the environment as discussed below.

4.5.5. Economic Loss

The term "economic loss" can be perplexing giving rise to questions including linguistic peculiarities for starters. In this vein perhaps the first question reasonably to be posed is whether "economic" is synonymous with "financial". From an English language perspective, this would appear to be an issue of nuance; in other words, even though the terms are often used interchangeably, they do not necessarily bear exactly the same meaning.[221] Incidentally, the notion of financial loss being linked to economic loss is supported by Christopher Hill who cites the celebrated case of *Hedley Byrne and Co. Ltd.* v. *Heller & Partners Ltd.*[222] as precedent for the proposition that "financial loss" may be recoverable in a negligence action.[223] This is precisely the notion of an economic loss in ship-source pollution law.[224]

Putting the semantics aside, as a general rule in both civil law and common law jurisdictions, economic losses are not compensable. In *Ultramares Corporation* v. *Touche*,[225] the distinguished American judge Cardozo J. held in relation to the compensability of economic losses as "...liability in an indeterminate amount, for

[220] [1961] 1 Lloyd's Rep. 1 (P.C.).

[221] Proshanto K. Mukherjee, "Economic Losses and Environmental Damage in the Law of Ship-source Pollution", in Aldo Chircop *et al*. (Eds.) *The Regulation of International Shipping: International and Comparative Perspectives, Essays in Honor of Edgar Gold*, Leiden, Boston: Martinus Nijhoff, 2012 at p. 344.

[222] [1964] A.C. 565 (H.L.).

[223] Christopher Hill, *Maritime Law*, Sixth Edition, London: LLP, 2003, at pp. 52-53.

[224] See Deana Silverstone, "Ship Source Oil Pollution Damage: A Canadian Perspective on Recoverability of Economic Losses and Damage to the Marine Environment", 9 *Marine Policy*, April 1985, London: Butterworth & Co (Publishers) Ltd. 108 at p. 109, where the term "financial losses" is used.

[225] (1931), 255 N.Y. 170 at p. 179.

an indeterminate time to an indeterminate class", recognizing "economic loss as compensable under the law is tantamount to opening the flood gates of litigation".

Economic loss is one important issue in the private law of ship-source pollution that is not clearly addressed in the conventions. In fact, the term "economic loss" is not used at all but one aspect of it - "loss of profit" is mentioned in the definition of "pollution damage", which in the opinion of one author does nothing but create obscurity and convolute the issue.[226] In any event it is used only in the context of impairment of the environment which, in the view of the present author, is insufficient as economic losses arise in many other instances of ship-source pollution such as damage to property. Taking the analysis further, it is submitted that there are three varieties of economic losses; namely, consequential loss, pure economic loss and relational or secondary loss. At the risk of "jumping the gun", it is further postulated that consequential losses are usually compensable,[227] pure economic losses are not but exceptions can be made in appropriate circumstances,[228] and relational or secondary losses are not compensable at all.[229]

Consequential Loss

The notion of consequential loss immediately raises the questions - consequential to what and is such loss compensable? In the present context the answer is that economic loss consequential to loss of or damage to property is compensable but not otherwise; which means that independent of property loss or damage, consequential economic loss would not be compensable. A clear and concise definition of "consequential loss" is "financial loss sustained by a claimant as a result of physical loss of or damage to property caused by contamination by oil".[230] Thus, consequential loss is compensable only if the loss of or damage to the property to which the consequential loss is related, is itself compensable.

A good example of consequential loss in the context of ship-source pollution is the loss of earnings suffered by a subsistence fisherman consequential to the loss of or damage to his fishing vessel or his fishing gear such as nets and trawls, or navigation equipment. Loss of earnings of shorefront businesses in an area of contamination resulting from ship-source pollution is another example. Here the financial loss may

---

[226] Proshanto K. Mukherjee, "Liability and Compensation for Environmental Damage Caused by Ship-Source Pollution: Actionability of Claims" in Michael G. Faure, Han Lixin and Shan Hongjun (Eds.) *Marine Pollution Liability and Policy: China, Europe and the U.S.*, The Netherlands: Wolters Kluwer, 2010, pp. 75-95 at p. 79.

[227] CMI Guidelines on Oil Pollution Damage**,** Part II - Economic Loss, Paragraph 4.

[228] *Ibid*, Paragraph 5.

[229] *Landcatch Ltd.* v. *International Oil Pollution Compensation Funds*; [1999] 2 Lloyds Rep. 316 at p. 327 per Cullen L.J. of the Court of Session Inner House at p. 329.

[230] CMI Guidelines on Oil Pollution Damage**,** Part II - Economic Loss, Paragraph 3(b).

be consequential to physical damage suffered by the business premises, or may be attributable to the damage to the marine environment in the vicinity of which the business premises are situated. Even if no physical damage is suffered by the property of the business, financial loss may occur because of lack of customers consequential to the polluted condition of the marine environment. In all such circumstances, consequential loss or damage will be compensable only if the loss of or damage to the property associated with the consequential loss is also compensable, and the consequential loss is not too remote.

Pure Economic Loss

An economic loss that does not qualify as a consequential loss is a pure economic loss which *prima facie* is not compensable as a ground rule certainly in cases where the loss is too remote. In *Spartan Steel and Alloys Limited* v. *Martin & Co. (Contractors) Ltd*[231]. the English Court of Appeal upheld a claim for recovery of consequential loss of profit but refused recovery of further losses on grounds of remoteness even though they were consequential to the physical damage to property of the plaintiff.

In the maritime domain, economic losses which are not consequential losses are typified by financial losses suffered by fishermen and others making a living out of the sea which becomes polluted after an oil spill. The losses may be attributable to various reasons such as a downward trend in the market, prohibitions imposed by local regulatory authorities pertaining to activities such as fishing in the polluted waters leading to loss of fishing grounds, loss of opportunity to earn an income, loss of business. All of these can occur independently of loss of or damage to property and would therefore be considered as pure economic losses. As indicated above, compensability will depend on the remoteness/proximity test and whether or not the loss was reasonably foreseeable by the claimant who suffered the economic loss.

Relational or Secondary Losses

A relational or secondary economic loss is one that is too remote to be compensable. A fisherman's loss of earnings is arguably not relational even if it is a pure economic loss, because his fishing activity which is his singular source of livelihood is inextricably tied to the polluted waters. But claims for loss of income made by a seafood processing plant located inland was held to be a relational loss.[232] The business location of Landcatch, the pursuers (plaintiffs) in these cases, was 500 kms

[231] [1973 1 Q.B. 27 (C.A.).

[232] *Landcatch Ltd*. v. *Braer Corporation and Others* [1998] 2 Lloyd's Rep. 552 and *Landcatch Ltd*. v. *International Oil Pollution Compensation Funds,* [1999] 2 Lloyds Rep. 316.

away from the site of the pollution. It was held that the claims were too remote and therefore not compensable.

In *P&O Ferries* v. *Braer Corporation and Another*[233] the claim of the pursuers was similarly rejected. In *Skerries Salmon Ltd.* v. *Braer Corporation*[234] as well, the courts reached the same decision. Incidentally all the above court actions arose from oil spill resulting from the grounding of the oil tanker *Braer* off the Shetland Islands. Following the grounding of the *Sea Empress* off Milford Haven and the resulting oil spill, the-plaintiffs, a fish-processing plant located 340 kms away from the site of the pollution, brought suit against the shipowners.[235] The courts at the trial and appeal levels held that the claims were too remote to be compensable.

4.5.6. Environmental Damage

Whether or not environmental damage or damage to the environment is compensable under the conventions must first be premised on a clear understanding of what this phenomenon is. There is no definition of the term(s) in the CLC package but notably, there is a definition of "damage to the environment" in the Salvage Convention 1989 as follows:

> ...substantial physical damage to human health or to marine life and resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.[236]

The definition is unhelpful in the context of compensability for pollution damage simply because it is designed for salvage law and is therefore barely relevant except with regard to physical damage to marine life and resources caused by pollution or contamination. On the other hand, in the CLC, the term "impairment of the environment" is to be found in the definition of "pollution damage".[237] What is notable about the above definitions is that both refer to "contamination" but neither definition seems to take account of the intangible dimension of the environment, that is, deprivation of use and enjoyment of the environment whether by virtue of a proprietary interest vested in the claimant or otherwise.

Whereas any loss or damage that falls within the definition of "pollution damage" is compensable under the CLC definition, whether impairment of the environment

[233] [1999] 2 Lloyd's Rep 535 (Scottish Court of Session, Outer House).

[234] [1999] S.L.T. 1196 (Scottish Court of Session, Outer House).

[235] *R.J. Tilbury & Sons* v. *Algrete Shipping Company,* [2002] EWHC 1095 (Admiralty).

[236] Article 1 (d) of International Convention on Salvage, 1989.

[237] CLC Article I (7).

is compensable is unclear. It seems compensability in that regard only extends to loss of profits from impairment of the environment and costs of reinstatement measures.[238] But what exactly is the environment and who can claim in respect of it is not clarified. Whether the intangibles referred to above can be included in a claim is uncertain. Aside from that, the phrase "other than loss of profit from such impairment" raises the question of compensability for economic loss albeit within the limits set out in the definition. How loss of profits and reinstatement costs can be compensable if the damage to the environment itself is not compensable is indeed a perplexing question. But that seems to be how the definition of "pollution damage" in respect of impairment of the environment has been implemented in the domestic legislation of at least one jurisdiction, the United Kingdom, as referred to above.

Compensability for environmental damage has other implications as well. One is the question of who has *locus standi* to claim. The state or other public authority may have *locus standi* in its capacity as custodian of the marine environment under the public trust doctrine or the doctrine of *parens patriae*. This was considered by the District court of Puerto Rico and the Court of Appeals in the *Zoe Colocotroni* case.[239]

The issue of *locus standi* in respect of the marine environment is particularly important in relation to a salvor providing environmental protection services. Whereas it is common ground that the shipowner is liable to remunerate the salvor in such situation, arguably, the shipowner's liability is premised on the salvor saving the shipowner from potential liability *vis a vis* the pollution victim. The question remains, however, whether the person in whom is vested the proprietary interest in the environment in question, or is the legal custodian of the environment standing in the position of a public trustee or *parens patriae*, should be liable to remunerate the salvor for provision of such services.

4.6. Conclusion

In this chapter, an attempt has been made to provide a synoptic rendition of the private law of ship-source pollution in so far as it relates to environmental protection services provided by salvors which is the central theme of this thesis. The discussion

[238] See UK Merchant Shipping Act 1995 s.181(1) giving statutory effect to the convention definition of "pollution damage".

[239] *Commonwealth of Puerto Rico* v. s.s. *Zoe Colocotroni* 456 F. Supp 1327 (D.O.R.), 1978. See also Proshanto K. Mukherjee, "Liability and Compensation for Environmental Damage Caused by Ship-Source Pollution: Actionability of Claims" in Michael G. Faure, Han Lixin and Shan Hongjun (Eds.) *Marine Pollution Liability and Policy: China, Europe and the U.S.*, The Netherlands: Wolters Kluwer, 2010, pp. 75-95.

includes general principles of the law of torts recognizing that loss or damage resulting from ship-source pollution is basically a maritime tort. The analysis then extends to a fairly detailed consideration of the CLC/Fund convention regimes which predominate this field of inquiry although it is recognized that the law outside the conventions which prevails in several jurisdictions is also important. In particular, for reasons explained in the text, the United States legislation manifested in OPA 90 is accorded special mention in view of the practical influence that legislation exerts on the world tanker trade.

The chapter progressively focuses on the law relating to liability and compensation addressing the issues of fault-based liability in the general realm of tort law and the move towards strict liability under the convention regimes. The other side of the coin from liability, namely, compensation or damages, is given a sound analytical treatment particularly under the CLC/Fund convention regimes extending to a discussion of the issues of economic losses and environmental damage.

This chapter flows from chapter 3 in which a similar synoptic rendition of the law of salvage is presented. It should be apparent that both these subject matters, that is, salvage law and private ship-source pollution law together provide the platform and prelude for a detailed analytical discussion of the environmental protection dimension of services provided by salvors which follows.

Part III
- Salvors' Remuneration for Provision of Environmental Protection Services

5. The Environmental Dimension of Salvage: Law Reform in Motion

> "Conscious of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment."
>
> (Preamble to the Salvage Convention, 1989)

5.1. Background

The genesis of the environmental dimension of salvage as we know it is indubitably the *Torrey Canyon* incident. This disaster instigated a paradigm shift in the law of salvage. It predicated a drastic deviation from the principle of "no cure no pay" which was hitherto the bedrock foundation of customary salvage law. The environmental dimension involving large scale oil spills as well as ship-source pollution even in smaller doses has given salvage a "changing face" which has resulted in the phenomenon which came to be known as environmental salvage. As there never was any independent basis for it in law, it is submitted that "environmental salvage" which has entered the lexicon of salvage law, took its cue from other concepts in that branch of law preceding it.

5.1.1. Refuge and Salvage

It is expedient at this juncture to examine the interrelationship between salvage and the grant of refuge by a coastal state to a leaking ship from which oil or other pollutant may be emanating. Since time immemorial, ships have been seeking refuge in sheltered waters or a port when in distress or faced with adverse conditions at sea posing a threat to the ship. Professor Edgar Gold, in pointing out that the decision to take a vessel to a port or place of refuge has traditionally rested on the ship's master or a salvor or person in charge of towage, has also stated -

> Like assisting ships in distress, rescuing life at sea, or offering salvage services, the entry to places of refuge by stricken vessels had been part of maritime custom and tradition since seafaring began. Both maritime and coastal states accepted that it was so and it was rarely if ever challenged – despite the fact that such places were almost always situated within the jurisdiction of coastal or island states.[240]

But as mentioned by Professor Gold, the distinguished father of modern international law, Professor Oppenheim has remarked that such "jurisdiction is to a certain small extent limited when the vessel has been compelled to enter a port in distress".[241] Whether at customary law there is an inherent right to refuge or a corresponding obligation on a coastal state to grant refuge is rather unclear.[242] Suffice it to say that regardless of the debate over the existence of any binding obligation otherwise, safety of human lives has always been a priority in shipping supported by custom of the sea as remarked by Professor Gold in the above-noted passage. Thus, it has long been customary to give refuge to a stricken ship. The position is still greatly persuasive in the contemporary era. However, where it is sought for the purpose of saving and preserving property at sea, a request for refuge is not likely to be granted if pollution causing environmental damage is inevitable or there is a high risk of it happening. If a ship seeking refuge is a polluter, most likely the coastal state will assert the position that *prima facie* it has a legal right to refuse entry into waters under its jurisdiction.[243] In that context, the potential plight of salvors is aptly expressed by a trio of authors in the following words:

> Refusal of salvage, whether in sheltered coastal waters or in a port, would cause difficulties for the salvor who needs to complete the commercial undertaking. The salvor could be faced with an extended and open-ended commitment. Further, where coastal state response authorities intervene in relation to the vessel, and during the contract, this could pose difficulties of co-ordination and decision-making. The salvor could be concerned about its potential liability when it is not in charge of an operation while its contract with the ship, through the master, subsists.[244]

---

[240] Edgar Gold, *Foreword* to Aldo Chircop and Olof Linden (Eds), *Places of Refuge for Ships*, Leiden/Boston: Martinus Nijhoff, 2006 at p. xi.

[241] L. Oppenheim, *International Law – A Treatise*, Vol. 1, 8th edition by H. Lauterpacht, London: Longman's, 1955 at p. 504, as cited by Gold, *ibid*.

[242] See Eric van Houydonk, "The Obligation to Offer a Place of Refuge to a Ship in Distress", *CMI Yearbook*, 2003, Part II, Documents for the Vancouver Conference pp. 403-445.

[243] Proshanto K. Mukherjee, "Refuge and Salvage", chapter 10 in Aldo Chircop and Olof Linden, (Eds) *Places of Refuge* Leiden/Boston: Martinus Nijhoff, 2006, at p. 272.

[244] Aldo Chircop, Olof Linden, Detlef Neilsen, "Characterising the Problem of Places of Refuge for Ships" chapter 1 in Aldo Chircop and Olof Linden (Eds), *Places of Refuge for Ships*, Leiden/Boston: Martinus Nijhoff, 2006 at p. 23 citing news item "Brussels Witch-hunt May Deter Salvors Offering Aid, Says ISU" in *Lloyd's List*, 17 March 2005.

There is no doubt that a salvage operation involving prevention or mitigation of environmental damage can benefit greatly from a place of refuge being given to the ship in question. Conversely, indiscriminate refusal by a coastal state to grant such a ship a place of refuge within its zonal jurisdiction can cause untold environmental harm to its coastline and coastal interests together with other consequential detriment. It has been exemplified in such disasters as the *Christos Bitas*, *Prestige, Erika*, *Castor* and *Khark 5* where requests for refuge were denied, that imminent threat of pollution can be averted if, at the request of a salvor or the master of a ship, a place of refuge is granted to a polluting or potentially polluting ship in good time.[245]

The *Castor* situation was perhaps the most telling of all such incidents. The vessel was refused entry into a place of refuge successively by the governments of Morocco, Gibraltar and Spain, and another five states over a period of some six weeks during which time it was towed around the western Mediterranean Sea encountering gale force winds and several hazardous situations including missing a near-hit encounter with another ship. Salvors on board together with others on the ship dauntingly endured the adverse weather conditions. Eventually, off the coast of Libya, a transfer took place and the vessel was towed to Greece where it underwent repairs.

Polluting and potentially polluting vessels have not only been refused refuge but have been sunk or otherwise destroyed at the behest of coastal state authorities. The infamous *Torrey Canyon* off the west coast of England and the *Kurdistan* off the east coast of Canada were sunk on the orders of enforcement authorities of the respective coastal states.[246] As the following discussion unfolds it will become apparent how in relation to salvage attempts, operations and refusals of requests for places of refuge, the phenomenon of environmental protection services provided by salvors normally captioned as "environmental salvage", has been evolving over the relatively recent past.[247]

---

[245] For other examples see "Places of Refuge", IMO Doc. MSC 77/8/2 of 14 February 2003 submitted by the IUMI.

[246] For an analytical account of all the instances mentioned above, see Proshanto K. Mukherjee, "Refuge and Salvage", chapter 10 in Aldo Chircop and Olof Linden, (Eds) *Places of Refuge for Ships,* Leiden/Boston: Martinus Nijhoff Publishers, 2006, at pp. 272, 274-275.

[247] Efforts were made to encourage coastal states to grant places of refuge, such as IMO Guidelines on Places of Refuge for Ships in Need of Assistance, IMO Guidelines on the Control of Ships in an Emergency and EU Places of Refuge Operational Guidelines.

5.1.2. Stringency of "No Cure - No Pay"

As mentioned earlier, fundamental to the customary salvage law is the principle of "no cure no pay" which essentially means that no remuneration is payable to a salvor if the salvage operation is unsuccessful. This has happened in several instances involving leaking tankers where the salvor did not achieve success because he was unable to preserve the ship due to intervention by public authorities. Many of the casualties that salvors have been encountering in relatively recent times are major oil spills from tankers causing huge real and potential pollution damage.[248]

On the environmental front, the rigidity of the rule of ultimate preservation of the *res* resulted in salvors refusing to proceed to the aid of leaking tankers where the *res* was sunk or otherwise destroyed as noted in the above passage. Salvors viewed such tankers as "leper ships", a term coined to emphasize their untouchability and consequential detriment to salvorial effort and investment.[249] The salvor's inability to earn a reward attributable to the harshness of the ultimate success requirement in cases of serious oil spills caused by tankers is said to be the genesis of the phenomenon of environmental protection services provided by salvors.

In the evolutionary process, it is apparent that with law reform in this field, the stringency of the "no cure no pay" principle has been considerably diluted. In the current milieu, the requirement for useful result exists in a different form in the context of the environment which has somewhat eroded the strictness of the "cure" requirement in "no cure, no pay".[250] The maritime community at large has perceived the need for deviating from the traditional or customary law of salvage to appease the salvage industry recognizing on the one hand, their pecuniary plight in incidents of pollution caused by tanker spills, and on the other, the indispensability of salvage services to the shipping industry. Steps have been taken through the 1989 Salvage Convention to alleviate some of the concerns of salvors in such cases but the salvage industry considers them to be inadequate which has brought the whole matter to a stalemate. Needless to say, this is an undesirable state of affairs which needs to be resolved expeditiously to enable international shipping and trade to thrive exponentially. How law reform has taken place in this regard is examined below.

---

[248] See Aleka Mandaraka-Sheppard, *Modern Maritime Law*, Vol II: *Managing Risks and Liabilities*, 3rd. Edition, London: Informa Law from Routledge, 2003, at p. 649.

[249] Edgar Gold, "Marine Salvage: Towards a New Regime", (1989), 20 *J.M.L.C.* 489 at p. 492. See also Brice, paragraph I-396 at p. 112.

[250] See Donald A. Kerr, "The Past and Future of 'No Cure, No Pay'" (1992), 23 *LMCLQ* 3, 411, at pp.419-421.

5.2. Enhanced Awards

5.2.1. Nature of Enhanced Awards

From the perspective of historical evolution, environmental dimension of salvage as a contemporary phenomenon in maritime law is inarguably rooted in the concept of the enhanced award. The customary law of salvage centres on property.[251] Salvors were remunerated for their services rendered to save maritime property, namely, ships, cargo and freight whose owners were liable to contribute to the remuneration *pro rata*. Whether or not salvors should be entitled to any privileges beyond what has traditionally been granted in salvage law leads to the notion of enhancement of awards to increase the salvor's reward for extra benefit conferred.

The English Admiralty court granted enhanced awards to salvors who in addition to successfully saving maritime property, also saved human life and were able to protect shipowners from being subjected to potential third-party liability.[252] The source of the notion of award enhancement was the inherent discretionary power vested in the tribunal adjudicating a salvage case to grant awards.[253] In the contemporary regime of salvage, it is notable that Article 7(b) of the International Salvage Convention of 1989 provides that the terms of a salvage contract may be annulled or modified (presumably by the relevant arbitral or judicial tribunal) if among other things, the payment made under it is "too small for the services actually rendered". The rationale for such generosity towards salvors seemingly lies in the public policy element of salvage law.

However, the grant of any enhanced reward is subject to the "no cure no pay" principle. In other words, only if the property in question is successfully saved, wholly or at least partially, can other benefits conferred by the salvor be taken into account in assessing the award. The conferment merely of a non-proprietary benefit, including the saving of human lives and aversion of potential liabilities, is insufficient to justify an enhancement of the award due to the absence of a proceeding *in rem* which is the ancient foundation of the right to salvage,[254] together with the resultant lack of a fund out of which the salvor can get rewarded.

---

[251] Kennedy, at p. 124.

[252] De La Rue & Anderson, at pp. 537-538.

[253] See paragraph 35 of the decision of the Federal Court of Appeal of Australia in *United Salvage Pty Ltd*. v. *Louis Dreyfus Armateurs SNC,* [2007] FCAFC 115 reported in [2007] 1 Lloyd's Rep Plus 87.

[254] *The Zephyrus* (1842), 1 W. Rob. 329 at p. 331; *The Fusilia* (1865) 3 Moo P.C. (N.S.) 51, at p. 55 both per Dr. Lushington; *The Cargo ex Schiller* (1877), 2 P.D. 145, at p. 149, per Brett L.J.

In summary, the notion of the enhanced award constitutes a tangential variation of the rigorous 'no cure - no pay' principle. It is judicially recognized as a derivate from and an indispensable part of the customary salvage reward; and represents a combination of 'cure' together with additional benefits conferred. The enhancement is not based on a separate category of benefit, especially saving of lives or aversion of liability, conferred on the owners; but rather the skill and effort used to incidentally confer other benefits in addition to primarily salving property.[255] Notably, the enhancement is non-separable from the rest of the final reward which is treated as an entirety and is therefore unquantifiable.[256]

5.2.2. Salvage Fund

The discussion flows naturally into the notion of the salvage fund which means "the values of salved property".[257] The enhanced award is paid out of the salved fund by owners of the property *pro rata*, namely, in proportion to their salved values.[258] As a result, if the ship is a total loss and the cargo is successfully saved, the cargo owner has to bear the whole enhanced award by himself.[259] Needless to say, the salvage fund is the limitation on the assessment of a salvage reward. This customary rule of salvage is codified in Article 13.3 of the Salvage Convention 1989 which states that no salvage reward may exceed the value of the property salved.

The importance of the salved value of the property is manifested in the fact that in the contemporary shipping milieu, sizes and values of ships have increased dramatically, and correspondingly, the hazardous nature of goods carried on them have also increased. This has resulted in the potential liability of shipowners expanding in multifarious ways which could easily exceed the amount of the salvage fund based on the salved value of property.

In the Australian case, *United Salvage Pty Limited* v. *Louis Dreyfus Armateurs SNC*[260], the importance of the salved value of the vessel and other property was duly noted by the Court of Appeal which held that it was not simply to be viewed as a

[255] Huiru Liu, "Environmental Salvage: 'No Cure-No Pay' in Transition", 23 *Journal of International Maritime Law*, 2017, at p. 285

[256] De La Rue & Anderson, at p. 539.

[257] Kennedy, para. 16-010

[258] Brice, at para. 6-27 at p.404.

[259] *The Cargo ex Schiller* (1877) 2 P.D. 145; See also De La Rue & Anderson, at p. 538.

[260] [2007] 1 Lloyd's Law Report Plus, 87, at para. 59.

fund for payment of the award. In support of its position, the Court referred to the judgment of Wilmer J. in *The Queen Elizabeth*[261], where at p. 821 he held-

> … where one has … a practical certainty of continuing damage and continuing expense, coupled with a possibility, even if it is not more than a bare possibility, of a much more serious loss, one has to give some real effect to the very high value of the salved property. By that I mean that one must give some effect to it, beyond saying to oneself merely that this is a case in which the value of the salved property at least provides a sufficient and abundant fund out of which to reward the salvors.

On the question of the magnitude of the salved value which correlates with the quantum of salvage remuneration to be paid, one view is that where the salved value of the property *prima facie* appears to be inordinately high, precision in arriving at the value may be of relatively less importance in the overall scheme of things. In *The Oceanic Grandeur*, for example, Stephen J. opined that imprecision in such a case would not have "any very material effect" on the salvage reward.[262] In any event, proportionality between salved value and the quantum of the award is of prime significance. As held by the Privy Council in *The Amerique*, "…though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered".[263] Indeed, this proposition was in line with the dictum of Lord Stowell in *The Blenden Hall* expressed as follows:

> In fixing a proportion of the value the Court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason, that in property of small value a small proportion would not hold out a sufficient consideration; whereas in cases of considerable value a smaller proportion would afford no inadequate compensation.[264]

In sum, it is indubitably the case that the salved value of the property saved has much to do with the quantum of the award, and in combination with consideration of the circumstances in a particular case, whether or not there is a justifiable reason for the award to be enhanced, can be determined by the tribunal in question.

---

[261] (1948), 82 Ll. L. Rep. 803.

[262] (1972), 127 CLR 312, at p. 342.

[263] (1874), LR 6 PC 468 at p. 475.

[264] (1814), 1 Dodson 414 at p. 421.

5.2.3. Life Salvage

Life salvage prompted the notion of enhancement of an award but it is payable only where life and property had both been saved.[265] As mentioned earlier in Chapter 3, life was not traditionally considered as a subject of salvage in its own right.[266] Salvage reward was not payable for saving human life alone. However, life salvage is an well-established enhancing feature to salvage award, that is, if life is saved in addition to property, an enhancement is granted to raise salvage reward to reflect that efforts.

In *The Bosworth (No.3)*[267] McNair J. held that - 'In effect, life salvage is strictly not a kind of common law maritime salvage, because the maritime common law did not know or did not envisage the conception of life salvage, but it is … a species of salvage created by Act of Parliament… for services rendered to ship, cargo and freight, enhanced by services rendered for saving of life'.[268] Thus it has been said in reference to that case that the award was for services rendered to ship, cargo and freight, enhanced by services rendered for saving of life. This was in light of the fact that life salvage in the true sense was a creation of Parliament applicable in cases where services for saving life could not be remunerated by an enhanced award against property saved in a casualty situation by the same salvor.[269]

There are commercial reasons that dominated this position not the least of which was the basic premise that salvage must be paid out of a fund constituted by the value of the property saved. The so-called salved value of property is therefore crucial to enable payment of salvage and is naturally and invariably linked to the "no cure - no pay" principle embodied in the LOF.[270] In practical terms, therefore, no payment would be possible if only life was saved. In *The Renpor*,[271] Brett L.J. thus held that something more than life had to be saved in addition to human life to provide a fund from which a life salvor could be paid. Needless to say, if life salvage is to be remunerated, the funds must come from the coffers of the shipowner and cargo owners.[272]

---

[265] De La Rue & Anderson, at p. 537.

[266] See section 3.7 of this thesis.

[267] [1962] 1 Lloyd's Rep. 483.

[268] ibid, at p. 490.

[269] De La Rue & Anderson, at p. 540.

[270] Edgar Gold, *et al Maritime Law*, Toronto: Irwin Law, 2003 at p.619.

[271] (1883), 8 P.D. 115 at p. 117.

[272] *The Emblem*, (1840), 8 Cas. 611 (D. Me.); Edgar Gold, *et al Maritime Law*, Toronto: Irwin Law, 2003 at p.619.

5.2.4. Avoidance of Liability

In the customary law of salvage which was codified by the 1910 Brussels Convention on Salvage, no right of a salvor to salvage remuneration or any other form of compensation was provided for his efforts to prevent or mitigate third party claims against the owner of salved property. However, as discussed above, courts utilized the notion of enhanced awards in instances where potential liability of the property owner was averted through preventive or mitigation actions taken by salvors.[273] Such actions have been a long-standing feature of salvage services which have attracted the grant of enhanced awards.[274] This was exemplified in *The Whippingham*[275] where an enhanced award was granted to a salvor for assisting a passenger ferry in avoiding collision with a number of sailing yachts of high value in its vicinity. Bateson J. in so rewarding the salvage tug held in reference to the ferry -

> I think she would have inflicted some damage on other yachts, which would have become claims, at any rate, against her. Whether she could successfully have resisted the claims--- she has already got five against her --- or whether she could not, is a matter, possibly, of some doubt. She might have been able to throw the blame on somebody else, but from what I have heard of the case I should think it would be very difficult for her to escape being partly to blame, at any rate, for what happened. The mere saving of a vessel from damage to other ships which might result in claims is a service, to my mind, because although the claim may not be a good one there is considerable damage attached to successfully defending a claim, because there is all the expense which you do not recover even when you are a successful defendant. I must think that in itself would be a ground of claim for salvage.[276]

Brandon J. as he then was, expressed a similar opinion in *The Gregerso*,[277] where a vessel grounded athwart the channel leading to Boston harbour and blocked the entrance to the port. It was straightened and saved by tugs belonging to the harbour authority. Being a public body under a legal duty to remove obstructions within the port premises, ordinarily the authority would not have been entitled to salvage payment because it would not have been a voluntary act. However, the learned judge, in assessing an award hypothetically took account of the wreck removal

---

[273] *The Merannio* (1927) 28 L1.L.Rep. 352, 353; *The Tsiropinas* (1935) 51 L1.L.Rep.87, 89; *The Glaucus* (1948) 81 L1.L.Rep. 262, 266; *The Queen Elizabeth* (1949) 82 L1.L.Rep.803, 820; *The Troilus* [1951] A.C. 820; *The Cythera*; *The Sandefjord* [1953] 2 Lloyd's Rep. 557; [1965] 2 Lloyd's Rep. 454.

[274] Kennedy at p. 145 and p. 161.

[275] (1934), 48 L1.L.R. 49.

[276] *Ibid* at pp. 51-52.

[277] [1971] 2 Lloyd's Rep. 220.

liability to third parties which the defendant shipowner would have faced had the harbour authority tugs not carried out the saving act.[278]

From the above discussion, avoidance of potential liability was taken into consideration in assessing salvage award, however, it was only as an enhancing feature when property was successfully preserved. As has been stated, the notion of award enhancement was strictly within the bounds of the "no cure no pay" principle. Even though salvage rewards have been enhanced where third-party liability of a shipowner is averted or minimized in addition to saving of property, the service for aversion of liability was not recognized as an independent subject of salvage which has historically centred on property.[279]

Even so, avoidance of potential pollution liability seems to be an exception. There does not appear to be any reported case in which a court was been requested to make an enhanced award under customary salvage law to salvors whose services have not only preserved property but also avoided pollution damage, except in the United States.[280] In *Trico Marine Operators Inc.* v. *Dow Chemical Co.*[281] the court granted an enhancement of the salvage award for preventing environmental damage, thus giving effect to Article 13.1(b) of the Salvage Convention 1989 even before it entered into force.

5.3. Liability Salvage

Prior to law reform of LOF 1980 and Salvage Convention of 1989, no incentives were provided to salvors for proceeding to the aid of leaking tankers posing an environmental threat where ultimate preservation of the *res* was not possible. This was frequently the case because of intervention by public authorities for fear of extensive pollution damage being caused. Eventually, the catastrophic *Amoco Cadiz* oil spill ranking at the top of the pollution disaster list, brought to the forefront the inadequacy of the existing legal framework of salvage in terms of encouraging salvors and providing them the necessary incentive to respond to tanker pollution incidents. Increasing public concern towards environmental protection gave rise to a compelling need for law reform in the realm of salvage.

---

[278] See *ibid* at p. 229.

[279] Brice, at 6-16.

[280] De La Rue & Anderson, at p. 537. Notably, enhanced awards were granted in private arbitrations under LOF in cases where salvors had avoided pollution damage in addition to saving property. This was the case even before LOF 1980 which introduced the environmental dimension into LOF.

[281] 809 F. Sup. 440 (E.D. La. 1992).

At the time, it was the 1910 Salvage Convention that mostly governed salvage operations internationally. It was an instrument created by the CMI,[282] which was perceived to be seriously inadequate to meet the contemporary problems relating to the environmental dimension of salvage law. The private sector pioneered law reform through revision of the LOF. The Committee of Lloyd's appointed a Working Party in 1979 to draft a new version of LOF to address the environmental aspects of salvage. A proposal was then put forward to impose a duty to avoid or minimize pollution damage on salvors and introduce a "pollution fund" to reward their environmental services. The Working Party's proposal for a "pollution fund" was based on the concept of "liability salvage" aiming to grant an independent reward for avoidance of liability regardless of success in saving property. The proposal was vehemently rejected by shipowners and their P&I clubs who argued the difficulty of placing a value to potential liability and calculating the amount of the "pollution fund". P&I clubs therefore advanced another proposal, namely, the notion of the safety net, subsequently adopted in LOF 1980.[283]

In tandem with the commercial initiative, and at the request of IMCO, CMI established an International Subcommittee to undertake an examination of the Salvage Convention 1910 and identify its deficiencies with particular regard to ship-source pollution incidents for the purpose of law review. The Subcommittee produced a report in 1980, shortly after LOF 1980 had come into effect, which was submitted to the CMI's 32nd Conference at Montreal in 1981.[284] The object of the report was to instigate a replacement of the 1910 Salvage Convention and create a new instrument in which the concept of salvage would extend to a new type of "liability salvage" which would take account of the efforts of salvors to avert third party liabilities of shipowners.[285] Again, the proposal attempted to put a value to the potential liability so that successful avoidance of it would be considered a separate justification and basis for a salvage reward regardless of success in salving property.[286]

Notably, the idea had already been abandoned and replaced in the private sector by the "safety net" scheme in LOF 1980; it was proposed again to CMI and the

[282] CMI is a non-governmental organization established in 1897 in Antwerp. The CMI was the only entity in the maritime field which initiated international conventions both in the private and public maritime law domains before any of the United Nations bodies in that field even existed. As it was not empowered to generate conventions, its instruments were adopted under the auspices of the Government of Belgium and came to be known as "Brussels Conventions".

[283] De la Rue & Anderson, at p. 544.

[284] See Erling Chr. Selvig, "Report on the Revision of the Law of Salvage" appearing as Annex 4 to the *Travaux Preparatoires* of the Convention on Salvage 1989, pp. 14-26.

[285] See "Salvage Convention 1989", *CMI Yearbook* 2011-2012, at pp.143-145.

[286] De La Rue & Anderson, at p. 544.

opposition from shipowners and their P&I clubs was no less at all at the CMI Montreal Conference. Their position was that even if it was desirable that a salvor should be paid some form of remuneration for conferring a benefit on shipowners by averting third party liabilities, how that would be accomplished was inconceivable given that there would be no salved value from which salvors could be rewarded. One commentator representing P&I interests, in opining on the inappropriateness of requiring pollution liability underwriters to make up the shortfall in salvors' awards, remarked that "the assessment of the potential liability which the salvor has avoided is virtually impossible to quantify". In criticizing the Sub-committee's report which advocates the need for higher total compensation, and seemingly promotes the concept of liability salvage, the same commentator has contended that it raises the possibility that P&I Clubs are compelled to pay indiscriminately for successful salvage operations such as avoidance of wreck removal liability. He questions - "[W]here does it end?".[287] It is submitted that although the proposal based on the report failed to attract unanimous support in Montreal, liability salvage is arguably a viable concept and it continues to be relevant and topical, although as discussed later in this chapter, the environmental implications of salvage as currently perceived must show the way ahead.

A compromise solution in the form of a "special compensation" regime, generally referred to as the "Montreal compromise" was incorporated in the draft convention adopted at the Montreal Conference 1981 which eventually reached the Legal Committee of IMCO (now IMO) for deliberation by the international maritime community.[288] Notably, the Salvage Convention 1989, the end product of those deliberations, makes no mention of liability salvage. It is contended that third party liability does not arise *ipso facto* in every salvage situation as a kind of risk from which the property owner seeks to be protected, but when a salvor exerts his effort to prevent it from happening, it undoubtedly warrants recognition as meritorious service.[289]

Another interesting point is that, in the United States, the Fifth Circuit Court of Appeals accepted the concept of liability salvage in the pre-OPA 90 case *Allseas Maritime S.A.* v *M/V Mimosa*.[290] The court recognized that preventing a shipowner from incurring liabilities protects the shipowner's interests, just as protecting the

---

[287] A.F. Bessemer Clark, "The Role of Lloyd's Open Form", *LMCLQ*, 1980, at pp. 299 and 301.

[288] See paragraph 6 of "Statement by Mr. Bent Nielson", representative of the CMI on the CMI Draft Convention, appearing as ANNEX to the IMO Legal Committee Report on the Work of the 52nd Session, (Document LEG 52/9) in Francesco Berlingieri, *The Travaux Preparatoires of the Convention on Salvage, 1989*", Antwerp: CMI, 2003 at p. 324.

[289] LOF Digest 2001, Lloyd's Salvage Arbitration Branch, at p.164.

[290] 812 F.2d 243 (5th Cir. 1987)

shipowner's ship or cargo does.[291] However, the court did not grant a reward for liability salvage due to the effect of the prevailing Limitation of Liability Act, 1851 which would have reduced the shipowner's liability to nothing. The effect would be quite the opposite after the promulgation of OPA 90. A rhetorical question is - what would have been decided if the case had happened post-OPA 90. The answer lies in the *Trico Marine* case,[292] where the Louisiana District Court decided not to follow the *Allseas Maritime S.A.* v. *M/V Mimosa* on the basis that the concept had been rejected in both the Salvage Convention, 1989 and LOF 1990.[293] Instead, the court decided to make an enhanced award to salvors for prevention of pollution damage, obviously pursuant to customary salvage law.

5.4. Safety Net in LOF 1980

As stated, in responding to the call for a new category of "liability salvage", shipowners supported by their liability insurers came up with the new 1980 version of the LOF. Several provisions concerning protection of the marine environment were incorporated in that version. The salvor, referred to as "the contractor" in the standard form agreement was committed to using his best endeavours to prevent oil escaping into the sea from the ship in respect of which the salvage services were being rendered in addition to the duty to salve the ship and cargo. In respect of the environmental part of the salvage operation, an enhanced award could be available taking into account the additional efforts expended by the salvor in successfully preventing or minimizing pollution. Needless to say, the basis of the enhanced award was "no cure no pay".

The most important feature of LOF 1980 is the notion of the "safety net". It provided for the contractor to be awarded his reasonably incurred expenses plus an increment of a maximum of 15% of those expenses even if the services were not successful or only partially successful, or if he was prevented from completing the job, provided there was no negligence on his part or on the part of his servants or agents, and only if the vessel in question was a laden or partly laden tanker with a cargo of oil. The expenses plus the increment so payable included actual out of pocket expenses plus a fair rate for tugs, craft other equipment and personnel used in the operation and only to the extent that it exceeded what was otherwise recoverable under the

[291] *Ibid.* at p. 247

[292] *Trico Marine Operators, Inc*. v. *Dow Chemical Co*., 809 F. Sup. 440 (E.D. La. 1992).

[293] The United States had ratified the Salvage Convention 1989 but it was not in force at the time of the decision

Agreement; namely, under the "no cure no pay" rule.[294] The contractual arrangement in LOF1980 described above came to be known as the "safety net". Interestingly enough, the expression *per se* does not appear in any convention or statute law, not even in LOF 1980, but people in the know recognize its metaphoric use and intended contextual meaning within that new version LOF.

The "safety net" concept was designed to allow the salvor to recover his expenses even if he could not receive salvage remuneration under the traditional "no cure no pay" principle. It basically signified recognition of the fact that under the rigour of the "no cure no pay" principle which had governed salvage law from the earliest times, a salvor could well be walking empty handed if there was no ultimate preservation of the *res*, which was frequently the case in tanker disasters. It was indeed a ground-breaking departure from the "no cure-no pay" principle which had hitherto been unwaveringly entrenched in the regime of salvage. Notably, damage caused by hazardous and noxious substances or pollution from bunker oil of non-tankers or tankers in ballast were not covered by the Agreement. Payment made to the salvor by the ship owner under the safety net was treated as third party liability and covered by the shipowner's P&I Club as his liability insurer.

The Funding Agreement 1980 between the hull and machinery insurers and the P&I clubs paved the way for the safety net to be instituted. The purpose of the Agreement was to put in place a mechanism for apportionment of insurance liability in oil pollution cases between underwriters of ships and liability insurers. In effect, it provides the financial support base for the practical implementation of the safety net device even though it is not a legally binding instrument, but rather a kind of "gentlemen's agreement". Finance is always a major concern in any law reform exercise and it is well-known that insurers are key players in such exercises as they are the eventual providers of indemnification. Law reform in salvage is no exception. Thus, in the final incorporation of the safety net concept in LOF 1980, the insurers as envisaged funders of the proposition had to be brought in.

The two parties were represented by the Institute of London Underwriters and Lloyd's Underwriters Association on the one hand, and the International Group of P&I Clubs on the other. It was agreed that in terms of the revised version of the LOF, that the H&M and property underwriters would continue to indemnify their principals for payments of salvage awards under existing policies including payment of enhanced awards for pollution abatement, whereas the P&I Clubs would pay for the full costs of the safety net including provision of security. The respective undertakings would continue until notice was given by either party of material change in circumstances. Notably, the Oil Companies International Marine Forum

[294] See paragraph 1(a) of LOF 1980. In this new scheme of the LOF, "oil" was defined to include crude oil, fuel oil, heavy diesel oil and lubricating oil in that paragraph. Incidentally the definition was consonant with that of oil in the Civil Liability Convention.

(OCIMF) who are self-insurers of oil cargo owned by their members became parties to the Agreement.[295]

The safety net of LOF 1980 laid the foundation for the special compensation regime subsequently established under the new Salvage Convention of 1989. Following the adoption of that convention, the 1990 version of the LOF incorporated certain provisions of the convention by reference making them contractually binding even though the convention was not yet in force and had not entered the domain of statute law in the UK. As a result, the safety net became practically defunct, which at any rate, offered less of an advantage to the salvage industry. By the time of the 1995 and subsequent versions of the LOF, the Salvage Convention became a part of the LOF by virtue of it being given the force of law through UK legislation. However, LOF 1980 continued to be favoured by salvors in certain instances mainly for two reasons. One, the 1980 LOF was applicable in waters beyond the national jurisdictions of coastal states whereas the later versions incorporating the convention only applied to "coastal or inland waters or areas adjacent thereto", words which in any event were not amenable to precise construction. Indeed, there have been pollution cases on the high seas involving laden tankers where salvors have insisted on contracting on the basis of LOF 1980 rather than the later versions incorporating the Salvage Convention. Second, even though the increment was only for 15% of the reasonable expenses incurred by the salvor, it was not subject to attainment of success as in the case of the Salvage Convention which provided a higher increment but only where the salvor succeeded in preventing or minimizing environmental damage.[296]

5.5. The Salvage Convention, 1989: Environmental Aspects

One of the drawbacks of the safety net was that it was integral to the LOF system, and the realization by the international maritime community that not all salvage was carried out under the LOF. There were other standard forms even though the LOF commanded a lead position in view of the fact that the vast majority of salvage operations were carried out under it. Also, LOF 1980 was only a partial solution to the complicated problems involved in the environmental aspects of salvage. At any rate, another solution had to be found which was more universal in use and scope. The international convention route was considered to be more desirable. The

[295] De la Rue & Anderson, at p. 546.

[296] *Ibid*, at p.545.

initiative for replacing the 1910 Salvage Convention with a new instrument was spearheaded by the CMI as discussed above.

It is arguable, however, and certainly from the perspective of this author, that convention mechanisms are not always the best way to achieve universality or uniformity in private law matters. First, national policies and interests take a front seat, sometimes with less regard to what is needed by commercial and industry interests to reach their objectives. Secondly, the process under treaty law is not all that expeditious. The entry into force of a convention is impeded because not enough states subscribe to it in good time for one reason or another. Giving effect to it through national legislation can take a long time especially in states where drafting and implementation expertise is not readily available.[297]

Be that as it may, in the arena of salvage, the convention route was thought to be the ideal method of law reform, especially where the foundation had already been laid by the "safety net" proposition. Within the ambit of a new convention focusing on environmental concerns, the LOF and other standard form agreements could operate quite effectively. Towards that end, the CMI undertook a review exercise of the private law aspects of salvage in tandem with the IMO looking into the public law side of the equation. The initial report of the CMI was released shortly after the effectuation of LOF 1980 containing the safety net device.[298]

The CMI initiative ending with the Montreal Conference in 1981 eventually culminated in the draft Salvage Convention. The CMI draft was placed with the Legal Committee of IMO in 1984 for deliberation by the international community. The whole process took about five years to come to fruition and reach finality. The Convention was adopted in 1989 and entered into force in July 1996.[299] In the United Kingdom, it became law in force through its incorporation into the Merchant Shipping Act 1995.

At the outset, it should be highlighted that the Convention contains two elements as incentives in Article 13.1(b) and Article 14 for salvors to assist ships posing a threat to the marine environment.[300] The safety net was ostensibly transformed into the Article 14 Special Compensation regime and the convention extended the regime to

[297] A notable fact is that salvors and owners later circumvented the solution in respect of environmental protection services and resorted back to a contractual solution. See more details in Chapter 7.

[298] De la Rue & Anderson, at pp.546-547.

[299] Cross-reference should be made to it to follow and understand the critical analysis of the provisions set out below relating to the environmental dimension of salvage.

[300] For an elaborate discussion see Archie Bishop, "The Development of Environmental Salvage and Review of the Salvage Convention 1989", 37 *Tulane Maritime Law Journal* 65, 2012-2013, at pp. 67-76.

include all vessels and not just laden tankers. It continues to reflect the customary law of salvage extracted from the 1910 Convention. The main features of the Convention pertaining to environmental matters are set out below with relevant comments.[301]

5.5.1. The Preamble

The preamble to a Convention gives the background, rationale and purpose of its adoption. It is important because the object and purpose or teleology can be gleaned from it. The purposive or teleological method of interpretation is enshrined in Article 31(1) of the Vienna Convention on the Law of Treaties, 1969 which provides – "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In Article 31(2) it is provided that the context can be gleaned from, *inter alia*, the text of the treaty "including its preamble and annexes".[302] At any rate, in relation to the present discussion, in the first instance, the preamble needs to be carefully examined as a feature of the Salvage Convention, 1989. It reads as follows:

> THE STATE PARTIES TO THE PRESENT CONVENTION,
>
> RECOGNIZING the desirability of determining by agreement uniform international rules regarding salvage operations;
>
> NOTING that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,
>
> CONSCIOUS of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment,
>
> CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger,
>
> HAVE AGREED as follows:

[301] A detailed analytical treatment of the environmental provisions of the convention is contained in De La Rue & Anderson, at pp. 549- 568. See also Brice, at paras 6-28 to 6-164.

[302] *U.N.T.S.* vol. 1155, p. 331. See Brice, at para. 6-83. The point to be noted here is that the preamble is only one source from which the context can be obtained.

It is notable that "protection of the environment" is mentioned twice in the second preambular clause. In the first instance, it points to the concern for environmental protection demonstrating the corresponding need for reviewing the extant international law of salvage. Secondly, it recognizes that efficient and timely salvage operations can make a major contribution to maritime safety and environmental protection. Both these matters should be taken into account by tribunals when they are charged with construing the Convention by looking at its object and purpose.

In terms of further indicating the teleology of the Convention, the preamble expresses the importance of the need to offer adequate incentives to salvors undertake salvage operations in respect of vessels and other property in danger. However, it is silent on the need to ensure that adequate incentives are available to services in respect of protection of the environment.

In the opinion of Brice, the preamble "expresses clearly the purposes of the Convention" and that in the event of "any doubt as to the meaning or scope of any article or provision, it can be more easily resolved by reference to the words of the preamble".[303] In the view of this author, the statements of Brice are too categorical as borne out by the last segment of the preamble as to whether the need to consider "adequate incentives" extends to protection of the environment. One view is that it does not. Geoffrey Brice himself raised the question in his book as to whether in construing the Convention by giving regard to its preamble, it can be said that the construction leads to "adequate incentives" being given to salvors to protect the environment, but he provided no conclusion.[304] On the other hand, in advocating the cause of the salvors in the *Nagasaki Spirit* case, he apparently emphasized "that the explicit purpose of the new salvage regime is, in the words of the preamble, to provide 'adequate incentives' to keep themselves in readiness to protect the environment".[305]

As indicated above, it appears that in this preambular statement, consideration of environmental protection has been omitted from the purview of "adequate incentives" pointing to the contention that the preamble is not all that clear. Given the seemingly two different views of Brice, it appears to this author, contrary to his statement that the preamble "expresses clearly the purposes of the Convention", that the object and purpose of the Convention is not entirely clear. However, an alternative view could be that protection of the environment can well be

[303] Brice, at para 6-83.

[304] *Ibid* in 6-83 and 6-85.

[305] It is to be noted that these are the words of Lord Mustill in his observation of what Geoffrey Brice stated in his submissions as counsel for Semco Salvage. See *The Nagasaki Spirit*, [1997] 1 Lloyd's Rep. at p. 332.

accommodated within the phraseology "vessels and other property in danger" without express mention of it. Thus, it can be said that from the words of the preamble the object and purpose can be gleaned, if not explicitly, then by implication based on the proposition that danger to property could result in danger to the environment.

In *The Nagasaki Spirit* Geoffrey Brice as counsel for Semco Salvage pointed to the "adequate incentives" factor in the preamble in support of his contention that "fair rate" in Article 14(3) should be construed in a manner so as to include a profit element. He submitted that in construing those words the teleological, or purposive approach to treaty interpretation should be adopted. Lord Mustill, however, in rendering the main judgment in the House of Lords was not impressed. He seemed to tangentially acknowledge that such a rule existed but was not in the least persuaded that its application should lead to the conclusion that the salvor's expenses in that case should include an element of profit as submitted by counsel for the salvors.[306]

It must be conceded that the Salvage Convention 1989 does provide financial incentives to encourage salvors to prevent or mitigate damage to the environment. This is manifested in Article 13.1 (b) which takes into consideration salvors' environmental efforts in the assessment of salvage rewards. Furthermore, Article 14 grants special compensation to them in the absence of success in preserving property, as discussed below. However, whether those incentives are adequate has become a matter of on-going debate. The absence of any reference to the environment in the fourth preambular clause in the Convention which only mentions "salvage operations in respect of vessels and other property in danger" restricts the reach of the incentives.

5.5.2. Definitions

Among others, the definition of "salvage operation" is important. It is stated as follows:

> "Salvage operation" means "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."

Notably, no element of protection of the environment is mentioned in the definition of "salvage operation" which exclusively points to assist a vessel or other property. Consequently, it is doubtful that under the Convention, efforts provided by salvors

[306] See section 6.4.5 of this thesis.

to prevent or mitigate damage to the environment are recognized as "salvage operation".

There is no definition of "salvage services" presumably because the term is not used in the convention. However, in Article 7(b), the term "services actually rendered" is used which may lead to the conclusion that "services" can be considered to be subsumed within "operations" in the context of the convention.[307]

The crucial definition of "damage to the environment" under the Convention refers to:

> "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents".

Within this definition, questions arise as to the precise meanings or connotations of the expressions "substantial physical damage" and "major incident". One explanatory source is contained in the CMI Report tabled at the 52nd Session of the IMO Legal which provides an insight from one perspective. It reads as follows:

> By using the words "substantial" and "major" as well as the reference to "pollution, explosion, contamination and fire" it is intended to make clear that the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned, and it must be a risk of substantial damage.[308]

It is submitted that the above explanation is of little help to the reader and user of the convention in understanding the purport of the words "substantial" and "major" in their respective contexts, especially in view of the reference to "risk of damage of a more general nature" in the second sentence followed by the words "risk of substantial damage" in the same sentence which seems to be a contradiction. Furthermore, there is nothing said about what exactly is "substantial", and the word "major" qualifying "incidents" is not even addressed. The explanation that "it is intended to make clear that the definition does not include damage to any particular person or installation" is, in this author's view, a moot point.

There does not seem to be any other documented source explaining what these terms are actually intended to mean. It is evident that the words "explosion" and "fire"

[307] This thesis refers to "salvage operations" and "salvage services" interchangeably.

[308] Document LEG 52/4 -Annex 2 of September 1984) in Francesco Berlingieri, *The Travaux Preparatoires of the Convention on Salvage, 1989*", Antwerp: CMI, 2003 at p. 111.

were queried by one delegation at the IMO Legal Committee.[309] In view of these two words being highlighted and followed by the words "similar major incidents" in the IMO Legal Committee Report on the 58th Session,[310] is indication that "major" probably means something as hugely serious as fire or explosion. One distinguished author has provided an incisive and insightful commentary on this matter as follows:

> … the emphasis on "major" indicates that there will not be environmental damage by small scale pollution. In many ways, the word "major" is more restrictive than substantial. There could be "substantial" damage to a penguin if it is killed by oil, even though only a small amount has been discharged. However, "major" seems to indicate that the damage must be more widespread.[311]

One author expresses the view that by "limiting the scope of environmental damage to 'physical damage' excludes economic losses", among other things.[312] It is submitted that exclusion of economic losses in respect of salvage awards is consonant with the law respecting compensation for ship-source pollution damage in many instances.

Aside from the above, it is notable that in its "Position Paper on the 1989 Salvage Convention" proposing to review the Salvage Convention 1989, the ISU suggested that "substantial" be replaced by "significant" but that suggestion did not find its way into the convention. There is also the incidental question of what constitutes "similar". To delve into that, one may have to look into the possible application of the *ejusdem generis* rule of statutory construction. Essentially one would have to ask whether pollution, contamination, fire and explosion belong to the same genre.[313] But that is somewhat beyond the intended scope of this inquiry.

A significant observation in relation to the definitions of "salvage operation" and "damage to the environment" as referred to above, is that salvage operations carried out in "navigable waters or in any other waters whatsoever" are covered by the convention, but damage to the environment is only covered where the damage occurs in "coastal or inland waters or areas adjacent thereto". In other words, high seas fall outside the scope of application of the convention. It follows therefore, that

---

[309] See Report on the work of the 55th Session (Document LEG 55/11 in Francesco Berlingieri, *The Travaux Preparatoires of the Convention on Salvage, 1989*", Antwerp: CMI, 2003 at p. 113.

[310] LEG/CONF.58/12 – Annex 2 in Francesco Berlingieri, *The Travaux Preparatoires of the Convention on Salvage, 1989*", Antwerp: CMI, 2003 at p. 114.

[311] Nicholas J.J. Gaskell, "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement, 1990", *Tulane Mar L. J.*, Vol, 16, 1991, 1 at p. 39.

[312] William L. Neilson, "The 1989 International Convention on Salvage", 24 Conn L. Rev. (1991-92), 1203 at p. 1233.

[313] See Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002, at p. 102-104.

no special compensation is payable for preventing or minimizing pollution damage on the high seas.

5.5.3. Duties

Article 8 bears the heading "Duties of the salvor and of the owner and master". Paragraph 1 speaks to the salvor's duty of care owed to the owners of the vessel and other property. Paragraph 2 spells out the reverse; the owners owe a duty of care to the salvor. The salient point in this Article is that both paragraphs also provide for due care to "prevent or minimize damage to the environment". Beyond that the salvor must carry out salvage with due care and the owners must cooperate with the salvor during the salvage operations. As well, the salvor must accept the intervention of other salvors if requested by the owners, but if the request is found to be unreasonable, it will not prejudice the original.

5.5.4. Co-operation

Article 11 calls for a state party to "whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general." Despite such requirement for cooperation between and among salvors and public authorities in relation to salvage operations, Article 9 emphasizes governmental intervention in salvage operations involving pollution by stating that "nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations." It is presumed that the reference to "generally recognized principles of international law" is a reference to the Intervention Convention of 1969[314] which was adopted by IMO at the Brussels diplomatic conference following the *Torrey Canyon* disaster.

[314] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, 970 *U.N.T.S.* 211.

5.5.5. Article 13 Salvage Reward

Article 13 is one of two Articles (the other is Article 14) which is germane to the inquiry in this thesis pertaining to the environmental dimension of salvage. It sets out the criteria for fixing salvage rewards and reads as follows:

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:
    a) the salved value of the vessel and other property;
    b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
    c) the measure of success obtained by the salvor;
    d) the nature and degree of the danger;
    e) the skill and efforts of the salvors in salving the vessel, other property and life;
    f) the time used and expenses and losses incurred by the salvors;
    g) the risk of liability and other risks run by the salvors or their equipment;
    h) the promptness of the services rendered;
    i) the availability and use of vessels or other equipment intended for salvage operations;
    j) the state of readiness and efficiency of the salvor's equipment and the value thereof.
2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.
3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved value of the vessel and other property.

In paragraph 1 above, there are ten itemised criteria for assessment of a salvage reward. Compared with its corresponding Article 8 in the 1910 Salvage Convention, the criteria set out in Article 13.1 are much the same, but sub-paragraphs (b), (h), (i) and (j) are new items relating to the assessment of the salvage award.[315] Sub-

[315] CMI Report to IMO, Document LEG 52/4 – Annex 2, Special Comments on Article 3-2 "The amount of the reward" which became Article 13.1 with minor changes. For the text for the Report, see Francesco Berlingieri, *The Travaux Preparatoires of the Convention on Salvage 1989*, at p. 300; See also Brice, 2011, *supra*, note … Appendix 8 at para. 16-28.

paragraphs (h), (i) and (j), are of prime importance for professional salvors as they represent their indirect costs. In particular, the words "availability" and "state of readiness" indicate that special consideration is to be given to how the salvor is positioned in terms of the task at hand. These additional criteria are designed to provide incentives for professional salvors who need to maintain their equipment including salvage tugs and crew on stand-by ready to respond to emergency situations as a matter of routine. Not only that, salvors must carry the financial burden of overheads in respect of equipment and personnel for the entire period of anticipated engagement including idle time and waiting period for any event.[316]

In terms of environmental protection as a task of the salvor, the criterion in sub-paragraph (b) is of particular importance. It refers to "the skill and efforts of the salvor in preventing or minimizing damage to the environment". One well-known commentator has remarked that this criterion serves as an incentive to "encourage salvors to go to the assistance of ships that threatened damage to the environment" subject to proving that such damage was actually prevented. According to him, it would not be sufficient to simply prove that there was a threat which could have materialized had it not been for the services rendered by the salvor.[317] Incidentally, according to paragraph 3, the reward cannot in any event exceed the salved value of the vessel and other property.

It has been pointed out earlier that the salvor's role and effort in helping to avert potential liability has attracted payment of enhanced salvage rewards.[318] But payment of enhanced awards for prevention or avoidance of pollution was not the norm except in the United States. As mentioned earlier, the court in *Trico Marine Operators, Inc*. v. *Dow Chemical Co*.[319] gave an enhanced award to salvors for preventing environmental damage even though the services were carried out under the principles of traditional salvage law. It can be said that in essence, this provision in the Salvage Convention reflects the prevailing practice regarding enhancement of salvage awards. In several jurisdictions, as a matter of industry practice, enhancement of salvage awards in special situations was already recognized as desirable. The Convention simply reinforced the notion of enhanced awards leaving

[316] CMI Report to IMO, Document LEG 52/4 – Annex 2, Special Comments on Article 3-2 "The amount of the reward". For the text for the Report, see Francesco Berlingieri, The *Travaux Preparatoires* of the Convention on Salvage 1989, at p.301-302; See also Brice, 2011, *supra*, note … Appendix 8, at para. 16-30.

[317] See Archie Bishop, "The Development of Environmental Salvage and Review of the Salvage Convention 1989", 37 *Tulane Maritime Law Journal* 65, 2012-2013, at pp. 67-68.

[318] See section 5.2.4 of this thesis. See also De La Rue & Anderson, at pp. 537-538.

[319] 809 F. Sup. 440, 1993 A.M.C. 1042 E.D. La. 1992.

it to future practice to determine its proportion according to the particular circumstances.[320]

In reference to Article 13(1)(b), it is not enough for him to simply provide services in connection with prevention or minimization of environmental damage; he has to show that he in fact, succeeded in doing so, in order to establish a claim for a reward under Article 13 taking the environmental factor into account. In contrast, to gain special compensation under Article 14, as explained in the next section, the salvor need only show that he exerted his efforts regardless of whether he actually succeeded in preventing or minimizing environmental damage. Needless to say, the onus would be on him to prove the same. According to De La Rue and Anderson, the standard of proof would be the same as needed for contending that an increment under paragraph 2 of Article 14 was warranted in the circumstances. Furthermore, pursuant to paragraph 2 of Article 13, the payment of a reward under that Article must be apportioned among the owners of the salved properties according to their respective salved values. But under national law, the award payable to the salvor may be channeled through one party, usually the shipowner, subject to his right of recourse against the other parties for their respective contributions towards the award.

In the final analysis, of course, it is their insurers who foot the bills; and according to De La Rue and Anderson, this is without regard to whether or not the property owner concerned would have been liable for pollution damage in the particular circumstances.[321] The criterion in Article 13(1)(b) referring to the skill and efforts of the salvor, points to the possibility of payment of an enhanced award by the property owners which has customarily been paid by their property insurers. Notably, the shipowner's property underwriter is not liable under its policy to indemnify the assured for environmental damage.[322]

5.5.6. Article 14 Special Compensation

The special compensation regime in Article 14 undoubtedly represents the main thrust of the new convention. If it is to be surmised that a principal object of the Salvage Convention 1989, is to ensure the provision of encouragement to salvors for their environmental efforts, then the importance of Article 14 becomes obvious

[320] CMI Report to IMO, Document LEG 52/4 – Annex 2, Special Comments on Article 3-2 "The amount of the reward". For the text of the Report, see Francesco Berlingieri, The *Travaux Preparatoires* of the Convention on Salvage 1989, at p.301; See also Brice, Appendix 8, at para. 16-29.

[321] De La Rue & Anderson, at pp. 555-556.

[322] More discussion on this point can be found in Chapter 9.

and indisputable. In the *Nagasaki Spirit* case, Lord Mustill described this regime as "a new financial recognition for conferring a new type of incidental benefit".[323]

It has been aptly demonstrated earlier that the rigour of "no cure-no pay" and the consequential harshness of the "ultimate success" requirement in traditional salvage law is what drove salvors away from leaking tankers. The incentives offered in the Convention to dissuade them from keeping such vessels at bay or abandoning them, are contained in Article 14. This Article needs to be carefully analyzed in light of Article 13 and by cross-reference to it. The following is a paragraph-by-paragraph examination of Article 14 which is at the heart of the Convention.

Paragraph 1 - Basic Entitlement

The first paragraph of Article 14 is as follows:

> If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined of the expenses incurred by the salvor.

Paragraph 1 sets out the conditions for entitlement to a special compensation so described which is the equivalent of his expenses as defined in the Article, that is, in paragraph 3.

The first condition for entitlement to special compensation is that the salvage operations must have been carried out "in respect of a vessel which by itself or its cargo threated damage to the environment". Needless to say, it is important in this context to carefully re-examine the definition of "damage to the environment" which has already been done above.

One query in this context is – what is "threatened" damage to the environment? There is no requirement of actual damage for Article 14 to apply; the mere threat of damage is sufficient. But the threat must be "substantial"[324]even if it is not "major".[325] The mere existence of threat as long as it is not fanciful triggers the special compensation regime. According to a well-known Lloyd's arbitrator, the

[323] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p.333.

[324] Brice, at para. 6-101.

[325] In some cases special compensation has been granted despite the fact that the risk was found to be small. For example, in *The Yinka Folawiyo,* a claim for special compensation succeeded despite the fact that the risk of bunkers escaping from the ship was found to be low to very low. See Lloyd's Casualty Reports, 9-28 October 1991. See also De La Rue & Anderson, at p. 558.

prevailing practice is to look at reasonable apprehension of danger of damage occurring at the time of the salvor's first response to the casualty.[326]

Another related question is – What if, any, is the difference between "threat" and "danger"?[327] It is notable that Article 13.1(d) refers to the concept of danger while Article 14.1 refers only to the concept of "threat". Danger, as articulated in Chapter 3, is one of the ingredients of salvage. Brice opines that a much broader approach should be taken for defining a "threat" under Article 14 than for finding a "danger" for the purpose of rewarding salvage services under Article 13.[328] Another point of view in this regard expressed by the P&I community is that "threat" should not be given too wide a construction, otherwise, the system will be cluttered with too many claims for special compensation; far in excess of what might have been contemplated by the drafters of the Convention.[329]

The second condition for entitlement to special compensation is that either the salvor fails to earn a reward under Article 13 or he receives a reward that is less than the amount of special compensation assessable under Article 14. The upshot is - where the reward is between zero and the amount of the salvor's expenses, some special compensation will be payable.

Furthermore, it is the ship owner who is solely responsible for the payment of the special compensation; none of the other property owners are. This contrasts with Article 13, where, as indicated above, all property owners are liable to pay for salvage on a *pro rata* basis according to the benefit received by each such owner albeit subject to channeling payment through the shipowner if such provision exists in the national law.

Paragraph 2 – Discretionary Uplift

Returning to Article 14, paragraph 2 dealing with uplift of special compensation reads as follows:

> If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no

[326] J. Willmer Q.C., "Salvage and Current Problems", Public lecture held at London Shipping Law Centre, June 1997, at p. 13 (see footnote 134 at that page) cited in De La Rue & Anderson, at p. 559.

[327] See De La Rue & Anderson, at pp. 558 - 559.

[328] Brice, at para 6-106.

[329] De La Rue & Anderson, at p. 559.

event, shall the total increase be more than 100% of the expenses incurred by the salvor.

In relation to this paragraph, attention must be drawn to the fact that the uplift or increment of special compensation is only payable if the salvor has in effect succeeded in preventing or minimizing environmental damage. This is distinctively different from paragraph 1 where entitlement to special compensation does not require actual prevention or mitigation of damage to the environment; performance of salvage operations will suffice.

A further point to note is that the amount of the special compensation representing the expenses may be jacked up to a "maximum of 30%"; and in deserving cases, to a further increment to "no more than 100%. Here, "deserving" means what is deemed by the tribunal to be "fair and just" in light of the Article 13(1) criteria. While it is recognized that only in exceptional circumstances can the increment rise to 100%, it is submitted that this provision is nevertheless manifestly anomalous because it contradicts itself virtually in one and the same breath going from a "maximum" of 30% to a "maximum" of 100%. Thus, paragraph 2 seems to provide for a two-tier discretion; tier one to increase the special compensation by up to 30% and the second to raise it further it up to 100%.[330] It could simply have been stated that "the special compensation paid to the salvor may amount to a maximum of 100% of the actual expenses incurred by him provided that the amount in excess of the actual expenses shall only be paid in extraordinary circumstances according to what the tribunal deems to be fair and just taking account of the criteria in Article 13, paragraph 1." The formula as it stands is one incongruous outcome of a deal struck between two opposing camps in the commercial shipping arena. It is not surprising that in the *Nagasaki Spirit* case, Lord Mustill in his decision in the House of Lords described it as a "strange formula";[331] and Staughton L.J. in the Court of Appeal, remarked amusingly that it was "a plain example of compromise emerging from a smoke-filled room as one could wish for".[332]

Regardless of the drafting anomaly appearing to be a substantive deficiency, overall the special compensation provision including the "uplift" formula undeniably gives to the salvor a better deal than previously.[333] Also, it is apparent that the P&I

[330] Kennedy, at para. 6-040.

[331] [1997] 1 Lloyd's Rep. 323 at p. 330.

[332] [1996] 1 Lloyd's Rep. 449 at p. 455.

[333] De La Rue & Anderson, 2009, at p. 547; Clarke J. in [1995] 2 Lloyd's Rep. 44 at pp. 52-53.

community was not against the special compensation scheme and eventually endorsed it after reaching a hard-fought compromise with the salvage industry.[334]

Paragraph 3- Salvor's Expenses

The special compensation regime is predicated on reimbursement of the salvor's expenses which is a defined term in Article 14. Paragraph 3 sets out the definition which contains two elements. The first is "out-of-pocket" expenses (which in accounting terms means disbursements) "reasonably incurred by the salvor" in respect of the salvage operations and is not difficult to determine. The second element is "a fair rate for equipment and personnel actually and reasonably used in the salvage operation". The full provision is repeated below:

> Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

In looking further into the first element it must be noted that the out-of-pocket expenses are only those that have been incurred in respect of the particular salvage operation. It cannot include normal overhead expenses examples of which are wages of the salvage crew, costs of regular supplies of stores and bunker fuel, but extra costs such as overtime payments to salvage crew in respect of the particular salvage operation, acquisition of specialized equipment and engagement of specialist personnel for the operation, would count under the out-of-pocket expenses.[335]

Importantly, in calculating the fair rate for equipment and personnel, as part of his expenses, which is the second element, the salvor must take account of the specified criteria in the mentioned sub-paragraphs of Article 13(1). These comprise promptness of services rendered, availability and use of vessels and equipment, and the state of readiness and efficiency of his equipment and their value.

At this juncture, it must be mentioned incidentally that the issue of whether in the computation of "fair rate for equipment and personnel", an element of profit should be included, was the core of the litigation in the *Nagasaki Spirit* case expounded in the next Chapter. Suffice it to say at this stage that the essence of the arguments was the position taken by the salvors that "fair rate" must include an element of profit according to the prevailing practice but the final judicial tribunal, the House of Lords decided otherwise, which was in support of the opposite contention of the shipowner.

---

[334] Staughton L.J. in [1996] 1 Lloyd's Rep. 449 at p. 455. See also Clarke J. in [1995] 2 Lloyd's Rep. 44 at p. 58.

[335] Brice, at paras. 6-115 and 6-116.

Paragraph 4 – Special Compensation Assessed and Special Compensation Payable

Moving on to paragraph 4 of Article 14, the provision in that paragraph clarifies that the special compensation finally payable to the salvor is not necessarily the amount assessed. The actual words of paragraph 4 are as follows:

> The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

For the sake of clarity, the "total special compensation" is referred to in this thesis as Special Compensation Assessed (SCA). It is calculated by application of the formula provided in the previous three paragraphs, that is, the basic entitlement (paragraph 1) in the amount of salvor's expenses defined in paragraph 3 plus any uplift by exercise of the tribunal's discretion (paragraph 2). The actually paid special compensation is referred to as Special Compensation Payable (SCP) which may be different from the SCA. Paragraph 4 provides in essence that SCP is the difference between the SCA and any reward paid under Article 13, where the SCA is higher than the Article 13 payment. If the Article 13 award is greater than the assessed special compensation, no special compensation is payable.

It is to be noted that the word used in this paragraph is "recoverable" and not "recovered". Thus, in assessing the amount of SCP under Article 14, the tribunal in question must notionally calculate in parallel, what may be "recoverable" by way of a salvage reward under Article 13 and carry out a cross-check. As explained above, where the amount of the SCA is greater than the notionally calculated award, the difference, that is, the SCP will be paid. In his decision in the High Court in *The Nagasaki Spirit*, Clarke J. remarked that "the expenses of a salvage operation are a relevant consideration in assessing the appropriate amount of salvage remuneration".[336] In his judgment, the learned justice provided a clear and comprehensive exposé of the whole scheme of special compensation provided in Article 14.[337]

5.5.7. Correlation Between Articles 13 and 14

When we speak of the special compensation regime under Article 14, we cannot look at it in isolation because it is intimately correlated to Article 13. As we have seen, even though Article 13 deals with traditional property salvage, a new enhancing feature has been added requiring the tribunal responsible for fixing the

[336] [1995] 2 Lloyd's Rep. 44 at p. 61.

[337] See [1995] 2 Lloyd's Rep. 44 at p. 48.

salvage reward in "encouraging salvage operations", to take account of the "skill and efforts of the salvors in preventing or minimizing environmental damage". The object of Article 14 is to provide some payment to salvors for their environmental efforts in cases where there is no or inadequate salvage reward under Article 13. In terms of the correlation between Articles 13 and 14, what it all boils down to is some simple arithmetical calculations in construing those two Articles. When facing a case involving special compensation, the tribunal needs to first calculate the qualified expenses as the basic entitlement of special compensation, then work out the uplift. The sum of the two is SCA. The final SCP is the result of SCA deducting the amount of the Article 13 award; which in turn could be anything between zero and SCA. The size of the reward recoverable under Article 13 will therefore progressively reduce or eliminate the amount of, first, basic special compensation under Article 14.1 and, then, the discretionary uplift under Article 14.2.[338]

In effect, it means that the tribunal in question must calculate the special compensation under Article 14 in parallel with the salvage reward under Article 13. Depending on how the tribunal deals with it in practical terms, the Article 13 amount may have to be calculated notionally in conjunction with the Article 14 calculation. The necessity for independent assessment of Article 13 salvage rewards and Article 14 special compensation is re-stated in the Common Understanding attached to the Convention under which "in fixing a reward under Article 13 or special compensation under Article 14, the tribunal is under no duty to fix an article 13 reward up to the maximum salved value of the property before assessing Article 14 special compensation."

The viewpoints in Kennedy on the interplay between Articles 13 and 14 are insightful and thoughtful, perhaps to an unnecessarily surgical degree. For example, it is rightly stated that whereas the salvage reward is primarily based on arbitral discretion, albeit taking into account the criteria set out in Article 13, special compensation is based on salvor's expenses which are supposedly based on a finite fact.[339] But that, it is submitted, is also based on discretion regarding what constitutes valid expenses under paragraph 3 of Article 14 and what is "reasonable" in deciding the amount of the uplift. Furthermore, in deciding what is a fair rate for equipment and personnel actually and "reasonably" used, also involves an element of discretion on the part of the tribunal, although admittedly, the test is an objective one. It is submitted, however, in this context, that "actual and reasonable" is a quaint mixture of subjectivity and objectivity. In other words, the tribunal looks at what has "actually" been expended and then decides whether it was "reasonable" or not.

[338] Kennedy, at para 6-032.

[339] *Ibid*.

After pointing out a number of common factors impinging on the initial computations of the salvage reward and the special compensation under Article 13 and 14 respectively, it is further stated in Kennedy that in assessing them both, the same factors should be used, but that the Convention does not seem to address this point. This author submits that, in the determination and computation of the second tier of the special compensation, paragraph 2 requires the tribunal to be fair and just "bearing in mind the relevant criteria set out in Article 13 paragraph 1." The rationale for supposedly not addressing this point in the Convention, according to Brice, is that it might result in some kind of double payment to the salvor.[340] In contra-distinction to the view expressed by Brice, Kennedy points out that Article 14 as drafted seems to allow such double payment. He states -

> However, the drafting of Article 14 is such that, within its terms, this should occur. Indeed Article 14.2's directions for its second tier discretion is that it should be exercised "bearing in mind" the relevant criteria in Article 13.1 *not* bearing in mind the extent to which those criteria have already been considered in fixing a salvage reward.[341]

In the opinion of the present author, even though her point of view has been fully endorsed by Kennedy, with all due respect, the analysis presented by both the highly-esteemed authors, is needlessly dense and overly surgical drawing in potentially excessive mathematical calculations supposedly based on legal considerations. For example, in the view of Kennedy, in the consideration of the criteria mentioned in Article 13(1) separately in respect of the salvage reward and the special compensation, the actual numbers may in consequence be quite varied. In the case of the former, the salved value being a cap, it will influence the quantum of the reward considerably; whereas the special compensation amount will be calculated on an objective basis depending on actual expenses incurred by the salvor although in deciding about the uplift, if any, the tribunal will have a relatively free hand. Furthermore, the two amounts will influence each other given that the payable special compensation may be anything between zero and the amount of the assessed special compensation depending on the amount of the Article 13 reward. Kennedy writes –

[340] Brice, at paragraphs 6-143 and 6-144.

[341] Kennedy at para 6-032.

> Naturally since basic special compensation is calculated objectively, the effect of the notional setting off of a sum taken into account in assessing the two types of payment will vary depending on whether the salvage reward is calculated on a modest or generous basis.[342]

On the other hand, it is reasonably arguable that the intricate calculations do matter in the real and practical world, because the legal provisions eventually translate into money and benefit one party or another in salvage cases involving the marine environment.

5.6. LOF and the Salvage Convention 1989

Whereas it was the safety net of 1980 version of LOF which provided the impetus for the articulation and eventual adoption of the Salvage Convention, 1989, further versions of the LOF continued to be produced.[343] Of particular interest in the present context is that following LOF 1980, LOF 1990 took on board a number of convention provisions which then became contractually binding even before the convention entered into force which took place in July of 1996.[344]

Notably, LOF 1980 was not restricted in its application to coastal and inland waters or waters adjacent thereto, whereas LOF 1990 and subsequent versions were tied to the geographical ambit of application of the Convention, whereby salvage operations conducted on the high seas were precluded from obtaining anything by way of a salvage reward or special compensation. Such was the case in the *ABT Sumner* incident in which a claim for special compensation was rejected under LOF 1990 because the oil spill took place on the high seas; specifically, because there was no threat of damage "in coastal or inland waters or areas adjacent thereto". Needless to say, there would not have been a rejection if the claim was made under LOF 1980. In several instances, salvors have insisted on using an older LOF which would have allowed payment regardless of the restriction of the geographical perimeter of the incident.[345]

The 1995 version of the LOF is important because it reflected the UK statute law which was inevitable as the LOF is subject to English law, and the British Parliament had through the Merchant Shipping Act 1995 given effect to the

---

[342] *Ibid*.

[343] The latest is LOF 2011.

[344] These were Articles 1(a) to (e), 8, 13(1), first sentence of 13(2), 13(3) and 14. See Clause 2 of LOF 1990.

[345] De La Rue & Anderson, at pp. 552-553.

Convention prematurely, *i.e*., before it entered into force internationally. From the salvor's point of view, this version of the LOF had the same disadvantage as its predecessor, the LOF 1990 in that it was applicable only within inland and coastal waters and waters adjacent to them. However, the advantage of LOF 1995 was that the convention increment applied, which was far more than what LOF 1980 and its predecessors provided.

At the diplomatic conferences leading to the Salvage Convention 1989, it was agreed that the H&M and cargo underwriters, that is, the property insurers, would indemnify the ship, cargo and freight interests under their respective insurance arrangements for Article 13 claims, but that the P&I Clubs as third-party liability underwriters would pay for any special compensation payments arising under Article 14. This agreement was arrived at regardless of the fact that the quantum of the salvage rewards would be determined after the skill and efforts factor relating to prevention or minimization of damage to the environment would be taken into account. This brings to end considerations of all matters pertaining to the Salvage Convention and the various versions of LOF prevailing at the time.

The later versions of LOF includes LOF 2000 introducing SCOPIC[346] and the current LOF 2011. Like LOF 1995, they all incorporate English law leading to automatic incorporation of the Convention.

5.7. Concluding Remarks

Following the *Torrey Canyon*, subsequent pollution disasters in the late last century drew huge public attention to the vulnerability of the marine environment. Salvors, on the other hand, proceeding to the aid of a leaking tanker frequently failed to earn a reward because coastal state authorities either destroyed the polluting ships or refused to provide a place of refuge, leading to no "cure" of the vessels in distress. Not surprisingly, failure to earn a reward under the rigid "no cure no pay" principle drove salvors away from leaking tankers, resulting in catastrophic pollution which otherwise could have been avoided or at least minimized.

The customary salvage law provided enhanced awards for salvors' effort in avoiding liabilities with the exception of pollution liability outside of the United States. The shift in public attention from property to the environment gave rise to the perceived urgency for law reform, in particular, to encourage professional salvors to prevent or mitigate damage to the environment. As a direct result of the *Amoco Cadiz* oil

[346] See section 7.2 of the thesis.

spill disaster, two parallel developments took place; one through the private law mechanism of the LOF, and the other through convention law.

The "safety net" concept was introduced through the 1980 version of the LOF. Subsequently, with some changes, it was adopted as the "special compensation" regime in the Salvage Convention 1989. Articles 13 and 14 of the Convention which are interrelated, comprise the legal framework of the special compensation regime. The regime was articulated seemingly to provide guaranteed compensation to cover salvors' reasonable expenses; namely, their out-of-pocket expenses and a fair rate for equipment and personnel, for preventing or mitigating pollution damage even if they failed to earn a reward for saving property. The safety net and special compensation provisions in LOF and Salvage Convention, 1989 respectively represented a major detour from and exceptions to the "no cure no pay" principle. The "safety net" of the LOF has been subsumed by the special compensation regime of the Salvage Convention which can be referred to as a "no cure some pay" regime.

Granted that in drafting terms, the Convention is not quite a model of clarity, the possibility of it being revisited in the near future is admittedly thin.[347]Like most international convention instruments, whether in the field of public or private maritime law, the final product resides in a zone of confluence and compromise with some conflicting elements floating as remnants.

[347] Lars Landelius, "Salvage Review" in The Swedish Club Letter No.2/1999 at p. 8.

6. The *Nagasaki Spirit* Frustration

> "The issue was whether 'fair rate' embraced a commercial rate embodying a profit element or whether it was confined to the reimbursement of expenditure, both direct or indirect. The House of Lords decided it was confined to reimbursement of expenditure."
>
> (John Reeder, *Brice on Maritime Law of Salvage*, Fifth Edition, London: Sweet & Maxwell, 2011, para 8-240 at p.612)

6.1. Background

Based on the so-called CMI Montreal Compromise of 1981,[348] the Salvage Convention 1989 apparently gave the impression that all parties concerned were satisfied with the delicately balanced solution which it provided.[349] Unfortunately, it was a mistaken assumption to be proven by the final outcome of *The Nagasaki Spirit* decision,[350]with which salvors were manifestly disillusioned and disenchanted. Incidentally, the salvors' viewpoint came to a head in this leading and only decided English case to date dealing directly with the environmental aspects of the Salvage Convention,1989.[351] Shipowners and their insurers were also dissatisfied with several operational practices arising from the Convention including the frequency and amounts of special compensation payments resulting from the

[348] For a detailed explanation of the 1981 Montreal Compromise, refer to Nicholas J.J. Gaskell, 'The 1989 Salvage Convention and The Lloyd's Open Form (LOF) Salvage Agreement 1990', (1991-1992) 16 *Tulane Maritime Law Journal* 1, at pp. 7 and 53-54; See also Michael Kerr, "The International Convention on Salvage 1989 – How It Came To Be", (1990) 39 *I.C.L.Q.* 530, at pp. 538-540.

[349] Francesco Berlingieri, *The Travaux Preparatoires of the Convention on Salvage, 1989*, Antwerp: CMI, 2003, at pp. 323-324.

[350] *Semco Salvage & Marine Pte Ltd*. v. *Lancer Navigation Co. Ltd*., *The Nagasaki Spirit* [1995] 2 Lloyd's Rep. 44; [1996] 1 Lloyd's Rep. 449 (C.A.); [1997] 1 Lloyd's Rep. 323 (H.L.).

[351] The only other notable case on the 1989 Salvage Convention was the decision of the Federal Court of Australia in *United Salvage Pty Ltd.* v. *Louis Dreyfuss Armateurs SNC* [2007] FCAFC 115; [2007] 1 Lloyd's Rep Plus 87, but that case only featured the application of Article 13. There was no environmental damage involved.

wide discretion exercised by salvage arbitrators in certain cases. Also, intervention from and of public authorities and their lack of cooperation and assistance did not sit well with the shipowners and their insurers.[352] This chapter unveils the frustration generated by this case as a prelude to what is to follow later in this thesis, points to the evolution of a new alternative in the offing and further developments discussed in detail in successive chapters.

6.2. Facts

This landmark decision went through four tribunals below[353] before finally reaching the hallowed halls of the House of Lords in 1997, five years after the fatal disaster took place in the Malacca Strait in 1992. The case, comprising five levels of decisions, is considered to be the epitome of salvage jurisprudence in the contemporary milieu of international shipping.[354] Incidentally, it was none other than the Late Geoffrey Brice, celebrated author on salvage law[355] and distinguished English barrister who acted for the plaintiffs in this case. In his words, it was "a test case of international importance on a point which has not so far been considered elsewhere".[356]

The facts of the case were aptly and admirably summarized by Clarke J. in his judgement sitting in the Commercial Court on appeal from the award of the Appeal Arbitrator. Lord Mustill subsequently adopted and endorsed it in his decision in the House of Lords.[357] Notably, the episode involved a collision followed by an explosion and an oil spill obviously leading to rescue and salvage operations and liabilities of sorts. This rendition of the case is concerned only with the salvage aspects of the incident pertaining to claims for property salvage and salvorial efforts to contain environmental damage. In the text below, a synoptic description of the factual situation leading up to the arbitral and judicial proceedings is provided. It is

[352] De La Rue & Anderson, pp. 568-569; See also Brice, at paragraph 8-243. There is more detailed discussion on this matter at the end of this chapter in section 6.5 of this thesis.

[353] Proceedings were first initiated through London arbitration followed by appeal arbitration, the High Court of England, and the Court of Appeal.

[354] *Semco Salvage & Marine Pte Ltd*. v. *Lancer Navigation Co. Ltd*., [1995] 2 Lloyd's Rep. 44; [1996] 1 Lloyd's Rep. 449 (C.A.); [1997] 1 Lloyd's Rep. 323 (H.L.).

[355] John Reeder (ed), *Brice on Maritime Law of Salvage*, Fifth Edition, London: Sweet & Maxwell, 2011.

[356] See Stephen Girvin, Case and Comment "Special Compensation Under the Salvage Convention 1989: A Fair Rate?" in [1997] *L.M.C.L.Q*. 321.

[357] See *The Nagasaki Spirit* [1995] 2 Lloyd's Rep. 44 at pp. 46-47; and [1997] 1 Lloyd's Rep. 323 (H.L.) at pp. 327-328.

extracted mainly from the reports of the two judgements referred to above, an IOPC Fund Note and scholarly literature.[358]

The Liberian oil tanker *Nagasaki Spirit*, *en route* from the Arabian Gulf to Brunei, collided with the container ship *Ocean Blessing* in the Malacca Straits at approximately 23:20 hours in the night of 19 September 1992. At that time, the tanker was part laden with a cargo of over 40,000 tonnes of Khafji crude, of which about 12,000 tonnes spilt into the sea and caught fire. The resultant fire engulfed both vessels. The whole crew of the container ship lost their lives and only two members of the crew of the oil tanker survived. On the following day, Semco Salvage & Marine Pte Ltd. of Singapore, referred to as the contractors under LOF, agreed to salve the tanker *Nagasaki Spirit* and her cargo under LOF 1990 terms and later also agreed to salve the container ship *Ocean Blessing* under the same terms.

The contractors succeeded in extinguishing the fire in 7 days at the end of which, in the afternoon of 26 September, the Malaysian police ordered the contractors to tow the *Nagasaki Spirit* further out to sea for fear of pollution. The vessel lay at anchor off the Indonesian port of Belawan on 3 October and remained there for 21 days. During this time, the contractors sought the permission of the Indonesian authorities to carry out a ship-to-ship transfer of the remaining oil on board. After it was granted, the remaining oil cargo of the vessel was eventually transferred to the *Pacific Diamond.* This happened by 3 November whereupon the salved *Nagasaki Spirit* was redelivered to her owners in Singapore after about six weeks.

As might be expected, several legal issues arose out of the proceedings in the case. Clarke J. in the Commercial Court identified six issues, of which, for the purposes of the discussion in this chapter, the first and central issue, to put it succinctly, was the interpretation of the term "fair rate" in Article 14.3 of the Salvage Convention, 1989. In the present discussion, the second issue, namely, "[I]n respect of what period is a salvor entitled to special compensation under art. 14.3" is also addressed.[359]The contractual relationship between the parties, Semco Salvage and Lancer Navigation was governed by LOF 1990 in which Articles 13 and 14 of the Convention were expressly incorporated. It is necessary to appreciate the chronology of the matters relating to the case which had important legal implications in terms of the judicial decisions. The Salvage Convention was adopted in 1989 but was only given effect in the UK as a dualistic state party, through the Merchant Shipping Act 1995 which was a year before it entered into force internationally. Meanwhile, the *Nagasaki Spirit* incident and the salvage operation under LOF 1990 took place in 1992 before the Convention became applicable law in the UK. The ensuing dispute, therefore, did not fall under the Merchant Shipping Act 1995. The

[358] See FUND/EXC.32/INF.1 of 5 October 1992; see also De La Rue & Anderson, at pp. 561-562.

[359] [1995] 2 Lloyd's Rep. 44 at p. 49.

point was first alluded to by Lord Staughton in the Court of Appeal when he stated that "the task upon which we are engaged is the interpretation of a private contract". In recognizing that its contents were not subject to UK statute law at the time, he remarked by citing the York-Antwerp Rules as an example, that if an international agreement contains terms that can form part of a private contract, it can be enforced through domestic legislation.[360] For his part, Lord Mustill in his speech in the House of Lords made that point in the following words:

> So far as English domestic law is concerned the Convention was given the force of law in the United Kingdom by the Merchant Shipping Act 1995 s. 224. But the Act did not affect rights and liabilities arising out of operations started before Jan. 1, 1996. Accordingly, the claim now under consideration is a private law claim, based on LOF 1990. The Convention is relevant only because having partly been inspired by LOF 1980 it is now incorporated by reference into LOF 1990.[361]

6.3. Chronology of Proceedings

As provided in LOF 1990, the governing contractual instrument, the matter of salvors', remuneration was referred to arbitration in London which included the claims against the shipowner, bunker owners and the cargo interests. Incidentally, the claim against the cargo owners was settled so that the arbitrator only had to deal with the remaining claims.[362] A notional award under Article 13 was initially made by the arbitrator Mr. Justice Richard Stone, Q.C. for the amount of $9,500,000 which included the claim against the cargo owners. But since the cargo owners did not appear before him, the arbitrator reduced the amount to $6,913,117 to be applied against the shipowner and bunker owners. The arbitrator then made an assessment pursuant to Article 14.3 regarding the salvor's expenses; and then under Article 14.2, granted an increment of 65% to arrive at the total special compensation amount of $12,635,893. Finally, upon application of Article 14.4, which required the deduction of the notional Article 13 award, the payable special compensation stood at $3,135,893.

Upon appeal by the contractors, the matter went before the appeal arbitrator Mr. John Willmer, Q.C., In setting aside the arbitrator's award, he held the view that the notional award under Article 13 was too low. He raised it to $10,750,000 but on taking account of the cargo owner's contribution, it was reduced to $7,822,737. But

---

[360] *The Nagasaki Spirit,* [1996] 1 Lloyd's Rep 449, at p.454.

[361] [1997] 1 Lloyd's Rep 323, at p.328.

[362] All amounts mentioned under this sub-heading are expressed in Singapore dollars which was the working currency in respect of the case.

contrarily, he considered the payment under Article 14.3 to be excessive and reduced it to $5,216,404. On applying the same 65% uplift, the total special compensation came to $8,607,066, which of course, was less than the award under Article 13; so that in the end no payment of special compensation was forthcoming.

Needless to say, the matter was not to end there. Both sides appealed. The next level was the Commercial Court of the Queen's Bench Division. There were 6 legal issues requiring decision, among which the most contentious was – what was the meaning of "fair rate" in Article 14.3 of the Salvage Convention? The decisions of three levels of courts on this very issue represented the crux of the case highlighting the misapprehension that all was well with salvage and the Salvage Convention 1989 in the context of its environmental dimension. In this discussion, we are particularly concerned with how this issue was addressed and disposed of by Clarke J. while recognizing the relative significance of the other issues, especially the question of period of time for which the salvor was entitled to payment of special compensation.[363] In his judgement, Clarke J. considered all aspects of all arguments in great detail, and on the question of "fair rate", unequivocally supported the position taken by the shipowners. On the other side, he fully concurred with the arbitrator and appeal arbitrator in supporting the position of the contractors that the whole period of salvage engagement must be taken into account in considering the expenses and computing the special compensation.

Unsurprisingly, the contractors appealed and the shipowners cross-appealed. The main issue of contention was the meaning of "fair rate", followed by the question of the time period relevant to the claim for special compensation. In the Court of Appeal, Staughton L.J., who delivered the principal judgement, upheld the decision of Clarke J. in the court below on all issues. On the issue of "fair rate", Swinton Thomas L.J. concurred with Staughton L.J. but Evans L.J. did not fully concur with his view. He dissented on the point regarding exclusion of the profit element although he agreed with Staughton L.J.'s rejection of the concept of salvage remuneration and agreed with limiting the claim under Article 14.3 to the expenses incurred.

There was then the ultimate appeal and corresponding cross-appeal to the House of Lords. In the final resolution of all the issues including the dispute regarding "fair rate", Lord Mustill delivered the main judgement in which he carefully reviewed the decisions of the lower courts. In concurrence with his decision, Lord Mackay of Clashfern L.C., Lord Goff of Chieveley, Lord Lloyd of Berwick, and Lord Hope of Craighead, dismissed both the appeal as well as the cross-appeal. Lord Mustill clarified the meaning of "fair rate" at great length supporting the position of the ship

[363] The other issues are set forth in [1995] 2 Lloyd's Rep. 44 at p.45 (headnote) and p. 49 (main text of the judgement of Clarke J.).

owners; on the issue of the applicable time in relation to the expenses for calculation of the special compensation, he aligned himself with the position taken by the contractor. It is evident that on the whole, all three levels of court held the same views, particularly, on the question of "fair rate for personnel and equipment" as provided in Article 14. 3 of the Salvage Convention. The decision of the House of Lords brought judicial finality to the case but dissatisfaction within the whole maritime industry lingered on. In the next chapter, it will be shown how industry reacted to the decision by finding a contractual way to circumvent it. But first, discussion is warranted on a number of sub-issues relating to the perceived notion of "fair rate" and the opposite and composite views on how that phrase ought to be construed.

6.4. Legal Issues

6.4.1. Fair Rate, Expenses and Profit Element

At the outset, it must be noted that the issue of "fair rate", in Article 14.3 of the Salvage Convention, flows from the notion of "special compensation" in Article 14.2; and that in turn is inextricably linked to the definition of "expenses" in Article 14.3. It is an inescapable cyclical order with the issues intertwined and tempered by the argument that "fair rate" should be calculated taking into account an element of profit in line with market practice. At the second level of proceedings, the Appeal arbitrator held in relation to expenses and "fair rate" that –

> Although the definition of expenses may be broad, it is still a definition of expenses. It does not support the finding of a fair rate at such a level as by itself to lead to an encouraging profit for the salvors, still less anything which would be regarded as akin to salvage remuneration. The addition of an increment under Art 14.2 could all too easily lead to a figure which went well beyond compensation and became salvage remuneration by the back door.[364]

On appeal to the English High Court, Clarke J. upheld the appeal arbitrator's conclusion on the construction of the "fair rate". As stated in the headnote to the case, he held that –

2) …it was significant that what was being defined in art. 14.3 was expenses and not remuneration or reward; the scheme of art. 14 was that the salvor was to be able to

[364] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 331.

recover expenses but not remuneration if he satisfied art. 14.1 and that he was to be entitled not only to his expenses but also to remuneration if he satisfied art. 14.2…

and

3) the effect of the references to art. 13.1(h), (i) and (j) in art. 14.3 was to ensure that a fair proportion of the cost of maintaining expensive vessels in a state of readiness was fully taken into account; it was not to transfer the concept of expense into something which went beyond what could fairly be regarded as a type of expense; if that had been intended it could readily have been done in plain language…[365]

However, Clarke J. disagreed with the manner in which the appeal arbitrator arrived at the quantum of the award and the figure for the expenses. In his view, the appeal arbitrator had, as a matter of law, mistakenly compared the assessment of special compensation under Article 14.2 and that of remuneration under Article 13 whereas each should have been quantified separately. He therefore sent the matter back to the appeal arbitrator for a reconsideration of the quantum of salvage.[366]

In the Commercial Court, Geoffrey Brice, acting for the contractors submitted that the whole purpose of LOF 1980 as well as Article 14 of the Convention was to encourage salvors to respond to situations involving serious potential damage to the environment and where chances of winning a salvage award was relatively slim. He further submitted that "fair rate" in Article 14.3 had to be construed to mean a fair rate of remuneration, otherwise the purpose to which he referred would not be fulfilled.[367] He thus submitted that "fair rate" must include an element of profit. However, Clarke J. declined to accept that proposition. He concluded that fair rate" could not conceivably include a profit element as it then could not be regarded as a part of expenses "reasonably incurred". To that effect he stated – "I do not see how a fair rate including an element of profit could fairly be regarded as part of expenses which had been 'reasonably incurred'. The profit element would be over and above what was reasonably incurred".[368]

With all due respect to the learned judge, this author is not inclined to agree with the statement and is of a contrary view. A careful perusal of Article 14.3 indicates that the definition of "salvor's expenses" is divided into two components; the first refers to "out of pocket expenses reasonably incurred", and the second refers to "a fair rate for equipment and personnel actually and reasonably used in the salvage operation …" The conjunction "and" in the middle of that sentence points to two

[365] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at p. 45.

[366] *Ibid*, at p.61.

[367] *Ibid*, at p. 50.

[368] *Ibid*, at p. 52.

separate components of the definition. Therefore, it is submitted that the second component referring to "fair rate" could well include a profit element as contended by counsel for the contractors. The phrase "reasonably incurred" refers to the out of pocket expenses which is the first component, whereas in the second component the words "fair rate for personnel and equipment actually and *reasonably* (emphasis added by this writer) used" refers to the salvage operation.

In the Court of Appeal, Staughton L.J. took notice of the fact that Mr. Brice drew attention to LOF 1980, in which for the first time the term "fair rate" appeared in the expression "…a fair rate for all tugs craft personnel and other equipment used".[369] It is apparent that the provision in Article 14.3 of the Convention containing the words "fair rate" was borrowed from there. In pointing out the primacy of the "fair rate" issue, Staughton L.J. stated that – "[T]he dispute in a nutshell, is as to whether the fair rate should represent the expense to the salvors of providing the equipment and personnel in question, or whether it should be a fair rate of remuneration for that service".[370] Speaking for the majority he added his own interpretation of "fair rate" as follows:

> a fair rate means a rate of expense, which is to be comprehensive of indirect or overhead expenses and take into account the additional cost of having resources instantly available. Remuneration or uplift or profits is to be provided, if at all, under art. 14.2. Beyond that, what is a fair rate is a matter of judgment for the tribunal(s) of fact.[371]

It is apparent from the above passage that the notion of fair rate is intimately tied to the expenses incurred by the salvor. Staughton L.J. reinforced that view by stating that "[T]he whole tenor of art. 14, until one comes to the element of fair rate, is of expenses". In that vein, after referring minutely and analytically to the provisions of Article 14.3, he continued – "That is as far as I would go, in seeking to define as a matter of law what is meant by a fair rate." As noted above, he then stated that "it means a rate of expense, which is to be comprehensive of indirect or overhead expenses and take into account the additional cost of having resources instantly available".

Even though Evans L.J. agreed with Lord Staughton in rejecting the argument that "fair rate" was remuneration or reward, he did not agree that it should be confined to costs or expenses and completely exclude a possible profit element.[372] He

---

[369] *The Nagasaki Spirit* [1996] 1 Lloyd's Rep 449 at p. 454.

[370] *Ibid.*

[371] *Ibid*, at p. 455.

[372] *Ibid*, at p. 457.

considered "fair" as denoting "fair to both parties", namely, salvors and shipowners, and explained in conclusion that –

> …the reference is to a (daily) rate reflecting the value of the services in question, taking into account of their commercial value when that can be assessed by comparison with market rates, which represent both the price of obtaining those services and the sum received by a contractor who provides them, salvage apart. When and to the extent that no market comparisons are possible, then the salvor's costs of providing the services together with any disbenefit which he has suffered in the form of lost profits from another source can and should properly be taken into account when assessing what the total "expense" to him has been.[373]

In the House of Lords, Lord Mustill recognized the significance of "fair rate" in terms of its relevance to the salvor's expenses when he held -

> The principal issue in the present appeal concerns the definition of "expenses" in art. 14.3, and in particular that part of it which includes in the expenses "a fair rate for equipment and personnel actually and reasonably used in the salvage operation".[374]

He then went on to identify four elements as possible components of "fair rate", principal among which, was whether the recoverable expenses could be assessed at "a rate capable of including an element of profit"; the other elements being "direct costs involved in the performance of the service and the additional costs of keeping vessels and equipment on standby". Finally, there was the consideration of whether the recovered expenses could be brought up to the level of a salvage reward.[375]

Lord Mustill, in emphasizing the importance of expenses in relation to fair rate and the inclusion of an element of profit stated as follows:

> The concept of expenses permeates the first three paragraphs of art. 14. In its ordinary meaning this word denotes amounts either disbursed or borne, not earned as profits. Again, the computation prescribed by art.14.3 requires the fair rate to be added to the "out of pocket" expenses, as clear an instance as one could find of a quantification which contains no element of profit, and it surely cannot have been intended that "salvor's expenses" should contain two disparate elements. It is moreover highly significant that art. 14.2 twice makes use of the expression "expenses incurred" by the salvor, for in ordinary speech the salvor would not "incur" something which yields him a profit.[376]

---

[373] *Ibid*, at p.460.

[374] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep. 323 at p. 330.

[375] *Ibid.*

[376] *Ibid*, at p. 332.

The above-noted passage unequivocally represents the *ratio decidendi* of His Lordship's judgement and demonstrates his viewpoint on the core factors of the dispute regarding what is fair rate in the computation of salvors' expenses and whether it should contain an element of profit.

To recapitulate the arguments advanced by the litigants which led up to the decisions of three levels of courts including Lord Mustill's final pronouncement cited above, it is instructive to briefly re-visit the positions taken by the salvors on the one side and the shipowners joined by their P&I Club, on the other. The contractors, Semco Salvage, contended that the fair rate of computation must of necessity include a profit element; the shipowners and their P&I Club vehemently disagreed, and their position was supported by the courts at all levels. Counsel for the contractors elaborated on their behalf that while the cost of personnel, use of salvage tugs and equipment including keeping them on standby was relevant, it was not simply a costing exercise for reimbursing the salvor for proven expenses in terms of assessment of a fair rate. Rather, the use of that expression in Article 14.3 in the context of "expenses", must in all circumstances refer to a fair rate of remuneration. Indeed, that construction would be compatible with the use of that term in ordinary English parlance, where it would not mean simply to recover expenses. Such a limitation would discourage a salvor from rushing to offer protection to the environment at the risk of huge expenses connected with the employment of his crew, craft and equipment, and would manifestly be contrary to the spirit of the Convention.[377]

The argument put forward by the other side, namely, the shipowners and their P&I insurers, was that the traditional law of salvage manifested through the "no cure-no pay" principle, dictated that in the absence of ultimate success in saving maritime property, the salvor receives nothing by way of remuneration. In those circumstances, just a reimbursement of expenses, with or without a profit, was infinitely better than getting nothing. It could serve as sufficient incentive and would have represented a marked improvement on the *status quo* of the times. Thus, it was contended by them that Article 14 had the objective of providing a reimbursement of proven expenses incurred by the salvor, and not for him to have his expenses calculated at a rate so as to exact a profit.[378]

The discussion above on "fair rate" is centred on *The Nagasaki Spirit* case, which is a part of English jurisprudence. In that vein, it is acknowledged that LOF 1990 was the relevant instrument under which the salvors undertook the salvage operations; and that the LOF is subject to English law meaning statute and case law.

---

[377] Geoffrey Brice, Q.C., "Salvage and the Marine Environment", *Tulane Law Review,* Vol.70:669, 1995, at pp. 675-676.

[378] *Ibid*.

However, it must be fully appreciated that the Salvage Convention 1989 is an international instrument, and that tribunals in jurisdictions other than England may have quite a different view of what is "fair rate" and how it is to be construed following which rules of interpretation. Geoffrey Brice alludes to the point that a well-known French author Professor Pierrre Bonassies relying on the French translation of the Convention, categorically disagrees with the opinion of Lord Mustill.[379] Brice also points to South African legislation giving effect to the Salvage Convention, in which it is provided clearly and categorically, contrary to the views expressed in *The Nagasaki Spirit,* that "fair rate" means "a rate of remuneration which is there having regard to the scope of the work and to the prevailing market rate, if any, for work of a similar nature".[380]

Notably, there has been no universal acceptance of the *Nagasaki Spirit* decision in other jurisdictions. The South African legislation giving effect to the Salvage Convention provides a clear and unequivocal meaning to "fair rate" which is totally contrary to the *Nagasaki Spirit* decision. Thus the final word in English jurisprudence is not binding on the international community which points to a lack of harmonization of construction as far as the Salvage Convention, 1989 is concerned. Incidentally, a brochure published by Smit Tak B.V. of the Netherlands, sets out the terms of engagement in Article 14 situations highlighting "predetermined day rates for personnel and equipment" which, in effect, circumvents the laborious process for establishing salvors' expenses contemplated in the House of Lords' decision.[381]

6.4.2. Construing "Fair Rate"

A sub-issue related to the question of what is "fair rate" is – how is that term to be construed? For starters, Clarke J. in reference to the award of the appeal arbitrator regarding this sub-issue, remarked that the latter had construed the contract according to the correct principles. The appeal arbitrator concluded, *inter alia*, that English principles of construction should be applied and that in keeping with that, the contract should be construed as a whole, and that particular words should be construed in their proper context. He further held that Articles 13 and 14 being expressly incorporated into LOF 1990 "should not be construed in a different way as contractual provisions from the way they would be construed under the

[379] See *The Nagasaki Spirit* [1997] 1 Lloyd's Rep. 323 at p. 334 to revisit His Lordship's opinion. Professor Bonnassies' opinion is found in "*La fin de l'affaire du 'Nagasaki Spirit': une esperance decue*, (1997) 571 *Le Droit Maritime Francois.*

[380] See Brice, at para 6-124.

[381] Aaron Gilligan, "*Nagasaki Spirit*: A Recent Decision Affecting Marine Salvage and Environmental Concerns", *Tulane Maritime Law Review*, Vol.22, 619, 1998, at pp. 623 and 624.

Convention" and therefore, "the context in which the Convention was made is itself relevant as part of the circumstances in which the contract has to be construed". Clarke J. seemingly adopted those conclusions of the appeal arbitrator.[382]

Whereas in the decision of Clarke J., no mention is made of any application of the rules of treaty interpretation, as distinguished from rules of statutory construction or principles of construction pertaining to contracts in English law, it is notable that under the caption "ordinary and natural meaning", there is substantial discussion on a rule of construction or interpretation that is common to treaties, statutes and contracts alike.[383] That is the fundamental rule requiring, in the first instance, application of the ordinary, natural or literal meaning to words and phrases in legal instruments of any sort. There are other rules pertaining to statutory construction and treaty interpretation found and discussed in relevant legal literature.[384] In statute law literature on statutory construction of words and phrases, and in English case law, synonyms of "ordinary" such as natural, plain, literal, and popular are often used.[385] When it comes to treaty interpretation, this methodology is often referred to as the textual approach to interpretation.[386] In particular, it is to be noted that Article 31 of the Vienna Convention on the Law of Treaties dealing with the rules of treaty interpretation provides in Article 31(1) - "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[387]

In his judgment, Clarke J. under the caption mentioned above, reiterated the appeal arbitrator's reasons that the words "fair rate" standing alone may accommodate a profit margin, but in conclusion, he declined to accept that that construction would be correct in light of the context in which it is used. Clarke J. seems to project a contradiction of views, by saying that whereas the ordinary and natural meaning of "a fair rate" would constitute a fair rate of remuneration having in contemplation the inclusion of an element of profit, the words must be construed in their proper

---

[382] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at p.49.

[383] *Ibid*, pp. 50-51.

[384] See, for example, Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002 and other books mentioned in Mukherjee such as Langan, P. St. John, *Maxwell on Interpretation of Statutes*, 12th Edition, London: Sweet & Maxwell, 1969; S.G.G. Edgar, *Craies on Statute Law,* 7th Edition, London: Sweet & Maxwell, 1971; and G.C. Thornton, *Legislative Drafting*, 3rd. Edition, London: Butterworths, 1987.

[385] *Regina* v. Wulff, [1970] 24 W.W.R. 549 (ordinary, grammatical meaning); *Fox* v. *Kooman* (1919), 121 L.T.R. 575, 83 J.P. 239 (C.A.) (ordinary sense); and *Ellerman Lines Ltd.* v. *Murray* [1931] A.C. 126 (H.L.) (natural meaning). These cases are cited in Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002, at pp. 84 and 107.

[386] See Mukherjee, *Ibid*, at p.134.

[387] *UNTS* Vol. 1151 p. 331 at p. 340.

context, which in this case apparently leads to a different result. In the words of Clarke J. -

In ordinary language, the concept of remuneration or reward on the one hand is different from that of compensation or expense on the other. To be remunerated or rewarded is to receive some profit from the service concerned whereas to be compensated is to receive recompense for expenditure. The notion of compensation or expense does not seem to me naturally to encompass the idea of remuneration, reward or profit.[388]

The implication of context was exemplified in the arbitrator's award in which he opined that it was of "great assistance in assessing a fair rate to know the actual cost and basic market rates, but a fair rate is none of these rates or a straight mathematical computation of those rates".[389] The figures for the special compensation to which he eventually arrived demonstrate his inclination to add a profit element to the "fair rate". Incidentally, the appeal arbitrator disagreed and reduced the amount. Again, in his decision, Clarke J. cross-referred to the decision of the appeal arbitrator, where the latter had stated that "…words should be construed in their context, both in relation to their context in the particular document, and in relation to the circumstances in which the contract was made".[390] Thus, it is submitted that the ordinary meaning or literalistic approach to interpretation does not necessarily lead to an inarguable solution once the factor of context is applied to it.

Further, regarding context, Lord Mustill in the House of Lords disagreed with the dissenting judgment of Evans L.J. in the Court of Appeal, that the proposition advanced by Evans L.J. "gives no weight to the context". He further went on to say that Evans L.J. attached "undue importance to the word 'rate' which was understood as reflecting a notional periodical payment to be multiplied up to a figure forming part of the expenses". In the view of Lord Mustill, the word "'rate' sent the enquiry into a wrong direction". He would disregard whatever the ordinary meaning of that word might be, and simply conclude that it meant an amount representing the cost of equipment and personnel, just the same as expenses amounting to "out of pocket" expenses.[391]

---

[388] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44 at p. 50.

[389] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 330.

[390] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at p. 49.

[391] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 334.

6.4.3. Remuneration and Compensation

A related question is whether in applying the "ordinary and natural meaning" rule of construction, it is proper to conclude that remuneration and compensation are synonymous. In his submission, counsel for the shipowners contended that the Convention drew a distinction between "reward" or "remuneration", meaning profit for the services concerned is included; and "compensation" or "expenses", connoting recompense for expenditure where profit is not included. The "fair rate" belongs to the latter.[392] Both the appeal arbitrator and Clarke J. accepted that submission. Clarke J. pointed to Article 1(e) of the Salvage Convention 1989 in support of his view that it does. It is respectfully submitted, that the words are given a synonymous appearance only in terms of the definition of "payment". Their meanings are different when a literal construction is applied to them. Remuneration is payment received for services rendered; compensation is payment made for causing or inflicting a wrong or detriment on another.

In the Court of Appeal, Staughton L.J. held that "[T]he word 'compensation' tends to point towards the reimbursement of money spent, although it could mean remuneration or reward". He particularizes the connotation of the word "compensation" by referring to Article 14.2 where supposedly it means reward since that paragraph provides that special compensation may exceed the salvor's actual expenses incurred, by two levels of percentages strangely incorporated in that provision.[393]

At any rate, the so-called strange formula is a product of compromise ending in a policy artificially devised and introduced in the Convention. Nowhere in the judgement is there a mention of application of any rule of construction in relation to the words "compensation" or "reimbursement". One can only assume that a plain meaning approach might have been considered and discarded in favour of uncertainty as a compromise solution. Ironically, in Staughton L.J.'s judgement, it is mentioned that "[O]ut of pocket" expenses plainly have the meaning of money spent; whereas "fair" is self-explanatory, "rate" simply means "a number of units of currency per unit of time".[394]

In the House of Lords, Lord Mustill referred to expenses as recompense but devoid of profit. He added that this notion "is further reinforced by the general description of the recovery as 'compensation', which normally has a flavour of reimbursement"; and went on to say that the word "compensation" has long been used to describe the amount recoverable as salvage under the traditional law of salvage. His Lordship

[392] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at p. 50.

[393] *The Nagasaki Spirit* [1996] 1 Lloyd's Rep. 449, at p. 455.

[394] *Ibid*.

then pointed to a clear distinction in paragraphs 1 and 4 of Article 14 between "compensation" and "reward"; and stated that the same contrast appears in Article 1 (e) of the Convention.[395]

With due respect, it is submitted that this explanation is convoluted at best. In the view of the present author, what is clear is that by applying the ordinary and natural meaning to both those words, regardless of the nuances in the Convention and usage in traditional salvage law, as well as the definition of "payment" in Article 1 (e) of the Convention, a better understanding of both those terms can be achieved. At the risk of being repetitive, it is submitted, not unduly but to reinforce a point, that the word "compensation" is a well-established legal term, albeit with an equally well-established non-legal connotation meaning payment in respect of loss, damage, harm or injury suffered. Payment for services is a different matter; it is a reward, award or remuneration in the jargon of salvage law as well as in ordinary English.

Regarding the profit element in "fair rate", Lord Mustill basically held that if a profit element were to be included in the computation of expenses to be reimbursed under article 14, it would in essence constitute a separate environmental salvage award which would in essence be a financing tool for maintaining vessels on standby and salvage gear in readiness, so they could be promptly utilized in the event of a pollution casualty. Evidently the framers of the convention had no such thing in mind.[396]Lord Mustill also found in the *travaux preparatoires* strong reinforcement for the shipowners' stance.[397]

To understand how the concept of profit fits into the picture, it is useful to re-visit the dissenting judgement of Evans L.J. in the Court of Appeal. In his dictum, he points out that regarding the proposition that an element of profit must be built into the computation of "fair rate", there is doubt as to what profit actually means and how it is to be calculated. Suffice it to say, the arguments are endless when it comes to application of the "ordinary meaning" rule. A better result can be reached by adopting the "purposive" approach as Clarke J. mentioned by reference to the decision of the appeal arbitrator that "the words used should be given a purposive rather than a narrow, literalistic construction, …",[398] a statement that "literally" echoes the dictum of Lord Diplock in *The Morviken*.[399] This approach is ideal when dealing with an international instrument, regardless of whether it has been transformed into national legislation, even though it is realized that in the present

[395] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 332.

[396] *Ibid.* See Aaron Gilligan, "Nagasaki Spirit: A recent Decision Affecting Marine Salvage and Environmental Concerns" – International Notes in *Tulane Mar. L.J.*, Vol 22, (1998), at p.622.

[397] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 332.

[398] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at p. 49.

[399] [1983] 1 Lloyd's Rep. 1 at p. 5.

case, the word "profit" does not feature in the convention in question. Notably, in the Court of Appeal, Staughton L.J. did not pay much attention to the purposive method; however, the dissenting judge Evans L.J. held that if the special compensation under art.14 is limited to reimbursement of costs disregarding any loss of profit altogether, it forms "a positive discouragement to the salvor".[400]

In the *Nagasaki Spirit* case, it is evident that both the textual or literalistic approach as well as the purposive approach were exploited by the courts in reaching their final conclusions as to analyzing the convention and to examining its object and purpose.

6.4.4. Use of *Travaux Preparatoires*

Under Article 32 of the Vienna Convention on the Law of Treaties, 1969, *travaux preparatoires* are, *inter alia*, supplementary means of treaty interpretation in situations where the general rules of interpretation entrenched in Article 31 of the Vienna Convention may lead to ambiguity, obscurity, manifest absurdity or unreasonableness in the determination of the meaning of a term.

Both parties and all the tribunals in the *Nagasaki Spirit* case agreed that resorting to the *travaux preparatoires* of the Convention was "a useful means of testing the tentative opinions already formed".[401] Incidentally, use of *travaux preparatoires* is permissible in the English Courts where the meaning of an international agreement is found to be unclear,[402] in spite of Lord Mackay of Clashfern L.C.'s reluctance to refer to it.[403]

In the hearing before the Commercial Court, both parties relied on the *travaux preparatoires* of the Salvage Convention to advance their views and legal positions. In particular, references were made to the Nielson Report prepared after the Montreal Conference of the CMI. In reference to what was later to become the special compensation regime in the convention after its adoption, it was stated in that report that the compensation would cover the salvor's expenses and could include "an additional special remuneration" in environmental damage cases which would never exceed the expenses. Interestingly enough, as submitted by counsel for Semco, the report does not always clearly distinguish between the concepts of remuneration and compensation.

An issue which arose before Clarke J. was whether the submissions of the ISU put before the CMI at its Montreal conference could be considered as *travaux*

---

[400] *The Nagasaki Spirit* [1996] 1 Lloyd's Rep. 449, at p.459.

[401] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 333.

[402] *Fothergill* v. *Monarch Airlines Ltd*., [1980] 2 Lloyd's Rep. 295; [1981] A.C. 251.

[403] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 326.

preparatoires. Clarke L.J., disposed of the matter by holding that it would not be proper to accept it on the grounds that it was superseded by the CMI Report and a subsequent ISU submission. He concluded that on the whole the *travaux preparatoires* did not do much to support the submissions of the contractor but acknowledged that the *travaux preparatoires* did support the shipowners' contention regarding the meaning of "expenses".

Notably, the dissenting judge in the Court of Appeal, Evans L.J. put strong emphasis on the *travaux preparatoires* and alerted all parties concerned to the fact that "it was equally important to remember that the task of the Court is to interpret the words which were in fact agreed, and to avoid making any assumptions as to what may or may not have been the objectives of the parties when they subscribed to them. Certain terms may be agreed even when the parties effectively agree to disagree as to what those terms mean".[404] In the House of Lords, Lord Mustill remarked that his opinions were founded independently without recourse to the *travaux preparatoires*, but he nevertheless referred to it because he found in them "strong reinforcement for the owners' interpretation of Art. 14.

6.4.5. Teleology of the Convention

It has been mentioned earlier that the Vienna Convention on the Law of Treaties, 1969 in Article 31 (1) provides that a treaty must be interpreted, *inter alia*, by looking at the "terms of the treaty in their context and in the light of its object and purpose". The operative words in this phrase are "object and purpose". Scholars have referred to the "intentions" or subjective approach and the "textual" or objective approach in treaty interpretation. In the realm of statutory construction, we have seen, that the textual approach corresponds to the literalistic or ordinary or natural meaning approach, subject, of course, to the particular context in which the word or expression is being used. A third approach is mentioned in scholarly writings known as the teleological approach. The teleology of a treaty is essentially its object and purpose to be gleaned *inter alia*, from the preamble of the treaty. That is what is emphasized in Article 31(1) in the Vienna Convention which seems to be sounder than the intentions and textual methods of interpretation.[405] The celebrated author Sir Ian Sinclair states that these approaches are by no means mutually

[404] *The Nagasaki Spirit* [1996] 1 Lloyd's Rep 449, at p. 460.

[405] See Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002, at p.134 where the author discusses all three approaches including the teleological or "object and purpose" approach in treaty interpretation.

exclusive.[406] Under Article 31(2), the context must be derived from the text of the treaty, its preamble and Annexes.

As we have seen earlier in this discussion, the context is of prime importance. It was mentioned by Clarke J. in his cross-reference in the Commercial court to the dictum of the appeal arbitrator in the *the Nagasaki Spirit.*[407] The appeal arbitrator disagreed and held that "the *travaux préparatoires* were inconsistent with a construction of art. 14.3 as providing a rate which was encouraging, even before the addition of any increment under art. 14.2".[408] Clarke J. in the Commercial Court upheld the appeal arbitrator's views. He himself held the view that the special compensation represents "a fair balance between all the interested parties and their various insurers and there is no reason to think that salvors will not continue to render valuable services to both the maritime community and the environment".[409] He reasoned that –

> The Convention has the effect of increasing incentives to would be salvors. It does so by protecting the salvor from being out of pocket or making a loss and by ensuring a proper contribution to his indirect costs. It is an advance on both the law of salvage and LOF 1980. It thus provides the salvor with a greater incentive and more encouragement than previously.[410]

In the House of Lords, Geoffrey Brice made much of the preamble to the Salvage Convention, by forcefully citing it to say that it clearly reflected the need for adequate incentives to be given to salvors; which in his view was as an "object and purpose" of the Convention. His submission in this regard was in support of his contention that the calculation of "fair rate" should include an element of profit. But Lord Mustill remained unconvinced. After going through the relevant facts of the case and what had transpired in the proceedings below, he entered into a detailed analysis of Articles 13 and 14 the Salvage Convention and then continued as follows:

> This purely textual account of the text must now be measured against the aims of the Convention. For Semco Mr. Brice emphasizes that the explicit purpose of the new salvage regime is, in the words of the preamble, to provide "adequate incentives" to keep themselves in readiness to protect the environment, and contends that a level of

---

[406] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd Edition, Manchester University Press, 1984 at p. 115. See also I. McNair, *The Law of Treaties*, Oxford University Press, 1961 at p. 356 in which the author attempts to synthesize the different approaches.

[407] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep. 44 at p. 49.

[408] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 331.

[409] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at p. 54.

[410] *Ibid,* at p. 52.

> compensation which will furnish in cases where the efforts fail without the salvor's fault no more than direct and standby costs is not adequate for this purpose. My Lords, as to the purpose of the Convention this is plainly right, but the careful submissions of Counsel have not persuaded me that this "teleological" method (as he described it) enables profitability to be written into expenses.

Lord Mustill went on to opine, in the first instance, that he did not think that salvors needed a profit element as a further incentive. In other words, the special compensation regime including expenses plus increment was sufficient incentive, way above the traditional salvage regime of "no cure-no pay", where lack of success no longer meant no pay.[411] In the second instance, he remarked, echoing the words of Clarke J. in the Commercial Court, that mentioning such things as "promptness, availability, state of readiness and efficiency" did not mean that the concept of expenses were transferred into something that went well beyond "what could fairly be regarded as a type of expense". If that was intended, it could have been written in by plain language. Lord Mustill for his own part then continued as follows:

> Furthermore, and in my view, decisively, the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment.[412]

The passage above is the classic statement of Lord Mustill which has inspired this author to undertake this research to test the desirability and feasibility of the proposition of a stand-alone regime of "environmental award" as proposed by salvors. The issue of what exactly is the teleology of the Salvage Convention 1989 and how is the Convention to be construed, what is to be derived as context from the preamble are baffling questions. This author notes that the key words in the fourth preambular clause are "adequate incentives" which refer to "persons who undertake salvage operations in respect of vessels and other property in danger". Incidentally, the definition of "salvage operation" does not include environmental protection which inhibits the reach of "adequate incentives" in terms of salvors' efforts to prevent or mitigate damage to the environment.[413] To this issue, Lord Mustill has spoken; in his view, the special compensation regime is incentive enough, if "adequate incentives" is held to be the object and purpose of the Convention. There is nothing in the Convention or the *travaux preparatoires* to suggest that the framers had in contemplation a separate regime granting a separate

[411] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, at p. 332.

[412] *Ibid*.

[413] See section 5.7.1 of this thesis.

reward to salvors for preventing or minimizing damage to the environment and also getting reimbursed for all their expenses reasonably incurred.

In the House of Lords, Lord Mustill recognized that one purpose of the Convention was to provide adequate incentives for salvors to protect the environment, but doubted whether this purpose would be accomplished under its interpretation of article 14.3. Under Lord Mustill's interpretation, the salvor no longer faces the risks associated with the "no cure, no pay" basis for compensation. If the salvor fails to provide a benefit to the environment, he is still entitled to "an indemnity against his outlays and receives at least some contribution to his standing costs." Because lack of success no longer means "no pay," Lord Mustill found that the purposes of the Convention were fulfilled.[414] In his view, the special compensation regime was designed as a "safety net" for eventualities where salvors could, quite conceivably, end up getting nothing under "no cure, no pay" despite providing meritorious services. In his view, the new system provided added incentives to salvors to encourage them to engage in operations for protecting the environment by preventing or minimizing damage to it.[415]

A related point of view is that in the interpretation of “fair rate”, Clarke J. in the Commercial Court basically viewed it in terms of its natural or ordinary meaning, even though he cross-referred to the appeal arbitrator’s decision where the latter advocated the use of the purposive approach.[416] Lord Mustill, in the House of Lords in his turn, rejected the teleological method of interpretation in favour of the “ordinary meaning” approach[417]and remarked that he was not interpreting a convention but rather dealing with a private law claim in contract.[418] Thus, clearly, no heed was paid to the object and purpose of the Convention as set out in the fourth preambular clause although His Lordship conceded that providing adequate incentives was a purpose of the Convention.

6.4.6. Period of Entitlement to Special Compensation

Another notable issue identified by Clarke J, in the Commercial Court concerns the period of time over which a salvor should be entitled to special compensation under

[414] *The Nagasaki Spirit* [1997] 1 Lloyd’s Rep 323, at p. 332.

[415] Aaron Gilligan, “*Nagasaki Spirit*: A Recent Decision Affecting Marine Salvage and Environmental Concerns”, *Tulane Maritime Law Review*, Vol.22: 619, 1998, at.622-623.

[416] *The Nagasaki Spirit* [1995] 2 Lloyd’s Rep. 44 at p. 49.

[417] *The Nagasaki Spirit* [1997] 1 Lloyd’s Rep 323 at p. 332.

[418] *Ibid*, at p. 328.

Article 14.3 of the Convention.[419] This matter was also discussed extensively in the five successive proceedings.

The salvage of the *Nagasaki Spirit* and her cargo lasted for 84 days in all, starting from 20 September 1992 when the salvors agreed to salvage and ending on 12 December the same year when the vessel was delivered to her owners.[420] The salvors contended that the period was the whole period of the salvage operations which, on a proper construction of the words "expenses" and "salvage operations", and in light of the purpose of the Convention must relate to the whole period and not just limited to the timeframe relating to environmental protection. Clarke J. held –

> There is nothing in the wording of art.14.3 or indeed of art. 14.1 or art. 14.2 which suggests that those expenses are to be limited to any particular part of the salvage operation, let alone that part of the salvage operation during which there remained a threat to the environment.[421]

In the opinion of this author, it is essential, in this regard, to look at the salvors' proposition in light of the convention definition of "salvage operations" and the teleology of the Convention as gleaned from the second and third preambular clauses. Both the arbitrator as well as the appeal arbitrator accepted the position of the salvors on this issue.

On the other hand, the shipowners argued that it was only the period during which a threat to the environment existed and it ceased on 10 November when "all the cargo had been discharged and the damaged tanks had been certified clean".[422] The shipowners also claimed that both the arbitrator as well as the appeal arbitrator agreed with that point of view, albeit implicitly. But Clarke J. was not convinced. He held that neither the resolution of any issue of fact, nor of the question of construction of the Convention bore any relevance to the amount of the shipowners' liability.[423]

All the five tribunals reached the same conclusion that it should be the entirety of the salvage operation. The *ratio decidendi* of Clarke J. in the Commercial Court was adopted by Lord Mustill in his speech which echoed the sentiment that the period

---

[419] *The Nagasaki Spirit* [1995] 2 Lloyd's Rep. 44 at p. 49.

[420] *The Nagasaki Spirit* [1996] 1 Lloyd's Rep 449, at pp. 451-452.

[421] See Geoffrey Brice, Q.C., "Salvage and the Marine environment", *Tulane Law Review,* Vol.70, 669, 1995, at p. 676.

[422] See *The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, at pp. 54-55.

[423] *Ibid*, at p. 54.

of entitlement to special compensation should be the whole period of salvage operations. He thus rejected the shipowners' contention.[424]

6.5. Summary and Concluding Remarks

It must be apparent from the foregoing discussions in this chapter that the *Nagasaki Spirit* case is as much about treaty interpretation as it is about the substantive law of salvage as contained in the Salvage Convention 1989, in particular, its environmental dimension. The primary rule of treaty interpretation, according to Article 31(1) of the Vienna Convention on the Law of Treaties, 1969, is to interpret the treaty, in the first instance, by reference to the ordinary meaning given to its terms, and in the second instance, by paying heed to their context and in light of the teleology or object and purpose of the treaty to be gleaned from, *inter alia*, the preamble. Under Article 32, as a supplementary means of interpretation, the *travaux preparatoires* may be used, which in the *Nagasaki Spirit* case was done at all levels of proceedings. Resort to the *travaux* was previously not permissible under English but that has changed since the decision of the House of Lords in *Fothergill* v. *Monarch Airlines Ltd*.,[425] English courts may now look at *travaux preparatoires* to assist them in treaty interpretation.

In the *Nagasaki Spirit*, the conclusions reached by the tribunals were seemingly based entirely on the natural or ordinary meaning of "fair rate" which was the central issue in dispute between the shipowners on the one side, and the salvors, on the other. Incidentally, relying on the plain or ordinary meaning of a word or phrase is a well-established rule of statutory construction in English law. However, with respect to treaty law, the purposive or teleological approach is the ideal because it incorporates the natural meaning together with consideration of the context.[426] As discussed above, the argument made on behalf of the salvors in this regard failed. Lord Mustill, even if he might have conceded the veracity of the teleological method, remained unconvinced that "fair rate" should include an element of profit. Given the unequivocal expression of "adequate incentives" in the preamble to the convention, as an object and purpose of it, a narrow, exclusive ordinary meaning approach to construing "fair rate" should perhaps have given way to the wider,

[424] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep. 323 at p. 334 in reference to *The Nagasaki Spirit* [1995] 2 Lloyd's Rep. at p. 58.

[425] [1980] 2 Lloyd's Rep. 295; [1981] A.C. 251.

[426] Proshanto K. Mukherjee*, Maritime Legislation,* Malmo: WMU Publications, 2002 at pp. 84-87 and p. 134.

market-based commercial policy espoused by the salvage and the property insurance industries favouring inclusion of a profit element.

The *Nagasaki Spirit* decision engendered frustration and dissatisfaction among all parties with the special compensation regime introduced by the Salvage Convention 1989. Even though the shipowners and their P&I clubs were perceived as the winners, they were also unhappy for different reasons. Unsurprisingly, salvors were critical of the decision which, in their estimation, ignored the fact that salvors had to maintain specialized tugs and salvage equipment to keep them in readiness throughout salvage operations to keep the environment safe from pollution. To meet the costs involved, substantial capital was needed for which salvors had to take out loans. Such an outlay of capital would be impossible to produce if a reasonable profit element was not factored into the calculation of "fair rate" under Article 14.3. They claimed that the special compensation regime as interpreted by the House of Lords in the *Nagasaki Spirit* provided less opportunity for professional salvors to earn sufficient rewards to remain afloat and stay in business.[427] They also had to grapple with how they should deal with reduced opportunities for intervention with fewer salvors in the business, and investment costs relating to vessels and equipment, all in the face of insufficient rewards.[428]

Even though under the Convention salvors were entitled to security including interests and costs, they faced practical difficulties with obtaining security for claims.[429] Security is not available until the payment is due and "payment" under Article 1 means "any reward, remuneration or compensation due" including an Article 13 reward and Article 14 special compensation. In respect of the Article 13 reward for saving property, a possessory lien guarantees a salvor's demand for security and a maritime lien ensures the enforceability of his claim in the absence of satisfactory security. By contrast, Article 14 special compensation is only available in the absence or inadequacy of saved property which translates into no maritime or possessory lien being available for a claim. In practical terms, P&I Clubs often refused to provide security according to their rules. This resulted in

[427] Incidentally, at a debate held by the London Shipping Law Centre on 19 June 1997, Lord Mustill stated in defence of his judgement that "he was only the pianist who had to perform the music composed by someone else". He was referring to the drafters of the Convention. See Aleka Mandaraka-Sheppard, *Modern Admiralty Law: With Risk Management Aspects*, London, Sydney: Cavendish Publishing Limited, 2001 at p. 662.*Modern Admiralty Law*, 2001, at p.734.

[428] Stephen Girvin, Case and Comment "Special Compensation Under the Salvage Convention 1989: A Fair Rate?" in [1997] *L.M.C.L.Q*. 321, at pp.327-328.

[429] Article 21 of the Convention provides that "upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor".

salvors' right to security under the Convention difficult to enforce leaving their special compensation claims unsecured.[430]

Shipowners and, more importantly, their liability insurers remained dissatisfied in view of special compensation being decided at all levels to be assessed by reference to the entire salvage operation rather than the duration of the threat of damage to the environment even if the threat ceased to exist before the salvage operation was completed. There was concern that they would be bearing the financial risks if the salvor continued with his services to save property where there was even a minor threat of environmental damage and it was removed early in the salvage operations, such as removal of bunkers from a stranded cargo vessel. In such instances, salvors would not be exposed to financial risks due to limited success or their expenses being disproportionately lower than the salved value of the property which would constitute the salvage fund.[431] Another related concern was threat of damage to the environment being construed too liberally which would trigger payment of special compensation in far more cases than contemplated by the drafters of the Convention.[432] Inadequate information on the conduct of salvage operations was a particular ground for dissatisfaction of the P&I community given that they would be responsible for paying special compensation. They also felt that the shipowners' right to terminate the salvage operation was too restricted.

All parties involved shared the concerns of uncertainty, cost and time involved in the assessment of special compensation. In particular, shipowners and P&I clubs felt scrutiny of salvors' claimed expenses to determine the payable special compensation was an unduly protracted and expensive process whether in arbitration or litigation.[433] Dissatisfaction brewing among all interested parties triggered the impetus for yet another call for regime change but this time it was to be through the LOF rather than by amendment of the Salvage Convention 1989 which would have been well-nigh impossible. As Brice has pointed out, "A committee of interested parties could not change the law; but it could give effect to its intentions by contract".[434] Regardless of the fact that the scheme of Article 14 was seen by the House of Lords as providing additional incentives so that salvors would not walk empty handed in pollution cases, the issue of adequacy of incentives to fulfill the environmental purposes of the Convention remains a big question mark because of the interpretation given to "fair rate". Ostensibly, the answer to the big

[430] De La Rue & Anderson, at p. 567.

[431] *Ibid*, at p.567.

[432] *Ibid*, at p. 559.

[433] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Journal,* Vol.37:65, at pp.74-76.

[434] Geoffrey Brice*,* "Salvage and the Role of the Insurer" in *L.M.C.L.Q*, Part 1, 2000 at p. 30.

question was a resounding negative, which was borne out by the subsequent return to the drawing board by the actors involved. What transpired next is dealt with in the next chapter.

7. The Advent of SCOPIC

> "The Committee of interested parties could not change the law; but it could give effect to its conclusions by contract. LOF was chosen as the vehicle for doing so."
>
> (John Reeder (Ed.), *Brice on Maritime Law of Salvage*, 5th Edition, London: Sweet & Maxwell, 2011, in paragraph 8-245 at p. [613])

7.1. Establishment and Evolution of SCOPIC

While it became abundantly clear that an alternative mechanism to replace Article 14 special compensation regime and circumvent the *Nagasaki Spirit* decision had to be designed which would serve the interests of all parties concerned, it was also thought to be unwise to introduce changes to the 1989 Convention at that stage because, as imperfect as it was, it still could serve as a legal framework for progress through changes to the LOF.[435] At any rate, the collective murmurs and ruffling of feathers led to the establishment in 1997 of a Sub-Committee of Lloyd's Committee comprising the International Group of P&I Clubs and the International Salvage Union to negotiate a new system. Later the London Property Underwriters and the International Chamber of Shipping joined the Sub-Committee.[436] The primary aim of the Sub-Committee was to define with greater certainty the circumstances in which salvors would be remunerated for environmental services on terms other than "no cure no pay", and to simplify the assessment procedure for such remuneration. Another aim was to improve the prospects for salvors to obtain adequate security and enable P&I clubs and other interested parties to better control their exposure to the costs of those operations.[437]

The upshot was the adoption of the Special Compensation P&I Club Clause (SCOPIC) as an optional addendum to the LOF, providing a tariff system to pay

---

[435] Stephen Girvin, Case and Comment "Special Compensation Under the Salvage Convention 1989: A Fair Rate?" in [1997] *L.M.C.L.Q.* 321, at p. 328.

[436] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Journal,* Vol. 37:65, at p. 76.

[437] De La Rue & Anderson, at pp. 568-569.

salvors for the services rendered. Incidentally and importantly, the tariffs had embedded in them, a profit element. Despite the use of the term "special compensation" in the description of the clause, it must be pointed out that it is distinctively different from the special compensation regime under Article 14 of the Convention. Indeed, it is an alternative to it based on a different underlying rationale, which can be used by choice of the parties if they so desire. It was envisaged that the system would provide an adequate incentive to salvors to undertake operations whether or not a threat of environmental damage existed. The system would be designed to ensure that salvors were remunerated on a pragmatic basis that made commercial sense and not just as a device to reimburse expenses.[438] It is submitted that despite the House of Lords disagreeing with the dissenting judgment of Lord Evans sitting in the Court of Appeal, the players in the salvage industry preferred his holding that the "fair rate" to salvors under Article 14 should be based on the commercial value of the services rendered.

SCOPIC was first introduced in August 1999 with the intention of it being used in conjunction with LOF 1995. A trial period of two years was planned; if the scheme worked to the satisfaction of all parties concerned during that period, then the LOF would be formally amended.[439] However, in 2000, revision of SCOPIC was brought forward by a year, to resolve certain inconsistencies and ambiguities which had been observed, and also to dovetail it with the LOF 2000 which was to come out that year.[440] Incidentally, starting with LOF 2000, the form has been simplified and reduced in length which contains only those provisions which relate to the services themselves and the rights and obligations of the parties. Many of the detailed provisions contained in previous versions are now set out in separate forms which are available for incorporation, into the main form, the SCOPIC Clause being one of them,[441] is optional.[442]

SCOPIC 2000 operated for a further five years until SCOPIC 2005 was introduced on 1 January 2005 to accommodate a number of minor changes mainly to take into consideration currency fluctuations, if any, between the date of termination of the salvage services and the date of any set-off, or of final assessment of the SCOPIC

[438] Geoffrey Brice, "Salvage and the Role of the Insurer" in *L.M.C.L.Q*, Part 1, 2000 at p. 30.

[439] "SCOPIC Amendment to Lloyd's Open Form: Part 1" published by West of England Association in *P&I International*, November 1999 at p. 258.

[440] De La Rue & Anderson, at p.569.

[441] Provisions relating to procedural and administrative matters are contained in a set of standard clauses (LSSA Clauses) and Lloyd's Procedural Rules can also be incorporated into the contract by reference. As such, the changes are cosmetic rather than substantive.

[442] De La Rue & Anderson, at p.549.

remuneration.[443] SCOPIC 2007 increased the tariff to 15% in personnel rates, 25% in tug rates and 15% in other equipment rates,[444] and alerted the effect of an award of misconduct by the salvor.[445] The next version, namely, SCOPIC 2011, came into effect on 1 January that year. It raised the rates again to an overall 10%, and placed a cap on rates paid in respect of the salvors' own equipment to avoid the total of the daily rates for using the equipment exceeding the purchase price in the event of prolonged use. In order to discontinue piecemeal increases in the SCOPIC rates and the length of time it took to negotiate and agree the rates each time, in 2012, an agreement was struck between the International Salvage Union (ISU) and the International Group of P&I Clubs (IG) to the effect that SCOPIC rates would be increased every three years in conformity with inflation as per the U.S. Consumer Price Index in view of the fact that the operating currency of SCOPIC was the US Dollar. Based on the new policy, SCOPIC 2014, which was the fourth increase, came into effect on 1 January of that year at 6.78 % overall on all items.[446] Subsequently, on 1 January 2017, Lloyd's published a revised Appendix A to the SCOPIC Clause to raise tariff rates by 3.6% across the board.[447]

The current version in use is SCOPIC 2018 as an optional addendum to its main agreement LOF 2011. There are three Appendices with different time references, namely, Appendix A indicating SCOPIC rate revised in 2017, Appendix B and C addressing Special Casualty Representatives and Special Representatives respectively revised in 2014. It is obvious that LOF, SCOPIC and its appendices are reviewed independently.

7.2. Scheme of SCOPIC

7.2.1. General Features

SCOPIC 2018 has sixteen clauses, setting out the basic scheme SCOPIC and the salvor-shipowner contractual relationship. The salvor is referred to as "Contractor"

---

[443] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 2012, at p. 86.

[444] See Hugh Hurst, "Amending the Salvage Convention 1989 – The International Group of P&I Clubs' View", in *CMI Yearbook* 2010, at p. 502.

[445] De La Rue & Anderson, at p. 569.

[446] See "ISU, SCOPIC and the SCR", http://www.marine-salvage.com/media-information/conference-papers/scopic-and-the-scr/

[447] The figure was calculated by this author by comparing SCOPIC 2014 Appendix A and SCOPIC 2017 Appendix A.

as in the main LOF. Two related Codes of Practices address the relationship between the P&I Clubs and the ship's underwriters in respect of SCOPIC. This is important because the insurers are not parties to SCOPIC and are therefore not bound by the contract. Notably, these are not binding instruments but rather are "gentlemen's agreements".[448] One is between the ISU and the International Group of P&I Clubs[449] and the other, between the International Group of P&I Clubs and property underwriters.[450]

SCOPIC is voluntary, better described as an optional addendum to the LOF. It is based on express consensus of the parties specifically record the fact that SCOPIC is incorporated. The SCOPIC clause itself is lengthy and complex. To gain a better understanding of it, one must remember that it was designed by its framers with the same intention in mind as Article 14 of the Convention; that is, to encourage salvors to proceed to ships in casualties where there is a threat of damage to the environment. It was also the aim of the drafters to stay as close to Article 14 as possible to enable the problems of that Article to be addressed. In practice, professional salvors almost invariably use the SCOPIC Clause, especially when there is the threat of environmental damage and salved values of the properties in question are relatively low.[451]

7.2.2. Incorporation and Invocation of SCOPIC

SCOPIC is a separate addendum to LOF, otherwise referred to as the "Main Agreement".[452] Its effect depends on two respective and contingent processes. The first is that the parties must agree to incorporate it into the main agreement; second, the contractor must exercise his option to invoke it. Some provisions of SCOPIC take effect by virtue of its incorporation; others take effect only if SCOPIC is invoked. SCOPIC is incorporated in the main agreement through a "Yes/No" form in the front page of LOF 2011 in which "No" must be deleted if the parties wish to

[448] See Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 2012, at p. 77.

[449] "Code of Practice Between International Salvage Union and International Group of P&I Clubs", ISU official website, available at http://www.marine-salvage.com/documents/SCOPICCodeofPracticeISU.pdf

[450] "Code of Practice Between International Group of P&I Clubs and London Property Underwriters Regarding the Payment of the Fees and Expenses of the SCR Under SCOPIC", Korea P&I official website, available at http://www.kpiclub.or.kr/data/SCOPIC_2014/06.Code_of_Practice_IG_P&I_Clubs_London_Property_Underwriters.pdf.

[451] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol.37:65, 2012, at pp. 77-78.

[452] See Sub-clause 1 of SCOPIC 2014.

opt for SCOPIC. Without the deletion, the Clause will not be deemed to be incorporated.[453] Thus, the application of SCOPIC is based entirely on the express consent of the parties, *i.e.,* the contractor and the shipowner.

If SCOPIC is not incorporated then Article 14 of the Salvage Convention will apply, if relevant to the factual situation. On the other hand, if SCOPIC is incorporated, then it will replace the salvor's right to special compensation under Article 14 which will no longer apply. Furthermore, if he invokes the Clause, the salvor will be entitled to claim the so-called "SCOPIC remuneration". However, in circumstances where he withdraws SCOPIC after invoking it, the protection of special compensation under the Salvage Convention 1989 will be restored. This is a crucial point for the salvor, for if SCOPIC is incorporated but not invoked, or is later terminated, the salvor will not be covered by either Article 14 or SCOPIC.[454] The net effect of incorporation of SCOPIC, whether or not it is invoked, is that it bars any claim under Article 14. In that case, the assessment of traditional salvage under the main agreement will continue in accordance with Article 13, regardless of whether SCOPIC is invoked.[455]

It is well recognized that one of the main problems with Article 14 is that there must be a threat of damage to the environment for it to be triggered. This has the potential to give rise to disputes which in SCOPIC is avoided through the institution of a simple mechanism, namely, a written notice given by the salvor to the shipowner at any time of his choosing, which is without regard to whether or not there is any "threat of damage to the environment".[456] Accordingly, assessment of the contractor's entitlement to SCOPIC remuneration starts from the time he gives the written notice. Any services rendered before that time are not remunerable under SCOPIC; but only on a "no cure no pay" basis in accordance with Article 13. Thus, if SCOPIC is incorporated in the main agreement, but the property to be salved becomes a total loss before the Clause is invoked, any salvage services rendered before the loss occurred will not attract SCOPIC remuneration.[457] Because the right to invoke SCOPIC rests solely with the salvor, Clause 7 Discount and Clause 9 Termination have been designed as counter-balancing measures for avoiding the incidence of SCOPIC being invoked in every case of salvage.[458] Once it is invoked,

---

[453] LOF 2011, Box 7 and Clause C; See De La Rue & Anderson at. p. 571.

[454] See sub-clause 1, 2, 4, 9 of SCOPIC 2014.

[455] De La Rue & Anderson, at p. 571.

[456] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 201 2, at p.79.

[457] See De La Rue & Anderson, at p. 571.

[458] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 2012, at p. 79.

SCOPIC will override any provision in the main agreement inconsistent with it, to the extent necessary to give the agreement business efficacy.

7.2.3. Security for SCOPIC Remuneration

As explained in the last chapter, Article 21 of the Salvage Convention 1989 provides for entitlement of security for the salvor's claim including payment of special compensation. However, it is not available until the payment is due. Also, no maritime lien is available for special compensation and, therefore, in the absence of security, there is no mechanism for enforcing salvors' claims for it. Furthermore, before the advent of SCOPIC, property owners were reluctant to provide security. In several instances, shipowners, at the behest of their P&I Clubs, refused to provide security and contested claims for special compensation by launching appeals. Depending on the outcome of an appeal, a shipowner would eventually be willing to negotiate.[459]

Designed to address those problems, SCOPIC provides for that the shipowner must provide security in the fixed amount of USD 3 million, inclusive of interests and costs, within two working days after receiving the salvor's written notice of invoking SCOPIC. The security, referred to as "the Initial Security", comprises "a bank guarantee or P&I Club letter in a form reasonably satisfactory to the Contractor" and guarantees the salvor's claim for SCOPIC remuneration plus interest and costs in the sum of 3 million US dollars.[460] The standard form for security is known as the "Salvage Guarantee Form ISU 5".

Since the Initial Security is a fixed amount to keep salvors covered, the subsequent likelihood of adjustment is unavoidable. As the salvage operation progresses, the likely amount of SCOPIC remuneration becomes clearer. There are thus more opportunities for both sides to agree on amending the necessary amount of security upwards or downwards. Thus, if the shipowners assess the SCOPIC remuneration reasonably, including interest and costs, and it turns out to be less than the security in place, they may require the contractor to reduce the security to a reasonable amount and the contractor is bound to do so once such amount is agreed. Conversely, the contractor may want the shipowner to increase the amount of the security on the grounds of reasonable belief that the Initial Security would be less than the SCOPIC remuneration; the shipowners must comply. The additional security is known as "Increased Security".[461] In the absence of agreement, any dispute concerning the proposed Guarantor, the form of security or the amount of

[459] *Ibid*, at p.80.

[460] See Clause 3(i) of SCOPIC 2018.

[461] Clause 3(ii)(iii) of SCOPIC 2018. See De La Rue & Anderson, at. p.571.

any reduction or increase in the security in place is to be resolved by arbitration as provided for in the main agreement LOF.[462]

7.2.4. Withdrawal and Termination by the Contractor

The consequence of the shipowners' failure to provide the Initial Security within two working days after invoking SCOPIC is salvors' right to withdraw from SCOPIC and fall back to the special compensation regime incorporated into LOF. If security is not so provided, the salvor has the right to opt, on giving written notice to the owner, to withdraw from the SCOPIC and revert to his rights under the main agreement, including Article 14 which is to apply as if SCOPIC had not existed. However, the right to withdraw is subject to the fact that at the time of the given notice of withdrawal, the owners have still not provided the Initial Security or any alternative security agreed to be sufficient.[463]

The circumstances dictate the extent of the contractor's right to withdraw from SCOPIC and whether an incentive is created for owners and their insurers to provide timely Initial Security. In some instances, it may be clear that owners' and insurers' interests would not be served if the salvors succeeded in claiming special compensation. This would be the case if there was a substantial possibility of the salvor obtaining a sizeable increment on his expenses. In such a case, special compensation would exceed SCOPIC remuneration significantly. Pending the arbitral assessment, there would be uncertainty regarding the amount of special compensation which would not sit well with the P&I Club for estimating a suitable reserve amount. If there is withdrawal from SCOPIC, shipowners would be deprived of their right to appoint an SCR to attend the salvage operation. In other instances, returning to special compensation would pose a disadvantage to salvors, particularly if the casualty was one occurring on the high seas, and there was no environmental threat which is a requirement for a special compensation claim under the Salvage Convention. On the other hand, in view of the Code of Practice operating between the P&I Clubs and the ISU, failure to provide Initial Security under SCOPIC could result in the Club in question facing undue political pressure.[464]

It is noted that the right to withdraw from the SCOPIC Clause is not a right of the salvor to withdraw from the LOF contract itself and bring it to an end. Nor does the right extend to a situation where Initial Security has been provided, but salvage operations are continuing and the salvor is seeking to have the security in place increased, that is, the Increased Security. In such case, since services under SCOPIC

[462] Clause 3(iv) of SCOPIC 2018.

[463] See Clause 4 (i) of SCOPIC 2018.

[464] See De La Rue & Anderson, at. p. 573.

have already commenced with the provision of the Initial Security, the Contractor's right to terminate services under both SCOPIC and the main agreement, is subject to certain conditions. The right of termination by the Contractor is available when the Contractor reasonably assesses the SCOPIC Remuneration to be greater than the security initially provided, then a reasonable sum for the Increased Security has been agreed by him and the shipowner or has otherwise been determined by the Arbitrator, but the shipowner fails to provide the Increased Security within two working days starting from the date of agreement or determination of that reasonable sum. Subject to those conditions, the Contract has the right to opt to terminate the services under both SCOPIC and the main agreement LOF provided notice is given to the shipowner. In that event, the Contractor is entitled to SCOPIC Remuneration due up to and including the termination date; its assessment should consider all monies due under the tariff date including a reasonable time for demobilization after the termination date.[465]

Compared with the previous SCOPIC 2014 version, the major change in SCOPIC 2018 is the Contractor's right of termination. Under SCOPIC 2014, termination by the Contractor was provided for under Clause 9 "Termination", parallel to that of the shipowner whereas under SCOPIC 2018 it is under Clause 4 "Withdrawal and Termination by the Contractor", parallel to his right of withdrawal. While the difference in layout is cosmetic, the substantive change is crucial to the interests of the Contractor who, pursuant to SCOPIC 2014, was entitled to -

> "terminate the services under the SCOPIC clause and the Main Agreement by written notice to owners of the vessel with a copy to the SCR (if any) and any Special Representative appointed if the total cost of his services to date and the services that will be needed to fulfil his obligations hereunder to the property (calculated by means of the tariff rate but before the bonus conferred by sub-clause 5(iii) hereof) will exceed the sum of:
>
> (a) The value of the property capable of being salved; and
>
> (b) All sums to which he will be entitled as SCOPIC remuneration"[466]

The termination by the salvor would apply to both SCOPIC and the main agreement if the contractual arrangement is no longer financially viable subject to the calculation that "the total cost of his services to date and the services that will be needed to fulfill his obligations to the property will exceed the sum of (a) the value of the property capable of being salved and (b) all sums to which he will be entitled

[465] See Clause 4(ii) of SCOPIC 2018.

[466] Clause 9(i) of SCOPIC 2014.

as SCOPIC remuneration". The cost of future services is to be calculated at the tariff rate exclusive of the bonus.

The Contractor's right of termination under Clause 9(i) of SCOPIC 2014 proved to be unworkable and provided him with no meaningful right to terminate. It is considered that such right should be allowed on the same basis as that of withdrawal. If the Contractor is not provided with increased security meaning no guarantee of future payment, he should be entitled to terminate without the need for any calculation as required.[467] Then there is the new term of "the Increased Security" lack of which leads to the right of termination according to Clause 4 (ii) of SCOPIC 2018. As a result, the initial right to withdraw and subsequent right to terminate SCOPIC are both based on the simple requirement of shipowner's failure to provide timely security.

7.2.5. SCOPIC Remuneration

One reason for the creation of SCOPIC was the complexity of Article 14 including the "strange formula".[468] Needless to say, there was confusion in the assessment of special compensation. Altogether, its virtual unworkability led to the eventual creation of SCOPIC with expectations that salvors would enjoy a definitive measure of remuneration on the basis of a three-prong system consisting of tariff rates, out-of-pocket expenses and a bonus, referred to as SCOPIC Remuneration[469] The tariff rates seem to replace the "fair rate" in Article 14.3; and the bonus appears to take over the increment in Article 14.2.

Notably, Clause 14 of SCOPIC 2018 clarifies that the assessment of SCOPIC remuneration includes, in addition to the prevention of pollution, removal of pollution in the immediate vicinity of the vessel, but only in so far as this is necessary for the proper execution of the salvage operation, not otherwise. It basically means any service to prevent or remove pollution damage carried out in the course of a salvage operation to save property at risk. This echoes the salvor's duty in SCOPIC and LOF which is to use his best endeavours to salve the vessel and other property thereon and in so doing to prevent or minimize damage to the environment,[470] the former being the primary duty and the latter being incidental. Fortunately, if his primary obligation is not discharged but he still uses his best endeavours to prevent or mitigate pollution damage, without salving property, he

[467] Rob Wallis, "Amendments to SCOPIC Clause 9.(i) – the Contractor's Right to Withdraw or Terminate SCOPIC Services", *The Quarterly Newsletter of ISU*, Q 3, October 2018, at p. 9.

[468] [1997] 1 Lloyd's Rep. 323 at p. 330

[469] Clause 5(i) of SCOPIC 2018.

[470] Clauses 10 of SCOPIC 2018; LOF

may be entitled to claim the cost of "preventive measures" under the compensation regime for ship-source pollution.[471]

Tariff Rates

Unlike the "fair rate" of the Salvage Convention, SCOPIC remuneration for the salvor's personnel and equipment is to be assessed on a time and material basis in accordance with daily tariff rates set out in Appendix A to SCOPIC which consists of personnel, tugs and other craft, and portable salvage equipment plus downtime where relevant. This tariff is reviewed and amended by the SCOPIC Committee according to Appendix B (1) on a triennial basis.[472]

With regard to personnel, the tariff sets out the rates applicable per day or *pro rata* for individuals of various job descriptions in so far as they are reasonably engaged under the contract, including any necessary time in proceeding to and returning from the casualty.[473] Different rates are given for tugs, comprising salvage tugs, harbour tugs, anchor handling tugs, coastal/ocean towing tugs, off-shore support craft and any other work boat in excess of 500 b.h.p., any launch or work boat of less than 500 b.h.p., and any other craft falling outside the above two types, provided they are reasonably engaged.[474] The tariff sets out rates payable per day including any time necessary for mobilization and demobilization, or *pro rata* for part thereof, for all listed portable salvage equipment. Others items outside the list are to be charged at a rate agreed with the SCR or determined by the Arbitrator.[475] In respect of tugs or portable salvage equipment, if there is a breakdown resulting from the performance of the salvage services and without any fault on the part of the salvor, his servants, agents or sub-contractors, SCOPIC provides a stand-by rate of 50% of the tariff rate plus the bonus for the period of repair while on site.[476]

The drafters of SCOPIC considered applying different rates to different locations since the rate was likely to be more or less profitable in various parts of the world. They dismissed this idea because it might have led to further complexities to the already complicated SCOPIC.[477] One P&I Club stated at the time of the establishment of SCOPIC that it was impossible to determine whether the tariff rates

---

[471] See Chapter 4 of this thesis.

[472] Clause 5(ii) of SCOPIC 2018.

[473] Clause 1(a), Appendix A to SCOPIC 2018.

[474] Clause 2, Appendix A to SCOPIC 2018.

[475] Clause 3, Appendix A to SCOPIC 2018.

[476] Clause 4, Appendix A to SCOPIC 2018.

[477] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol.37: 65, 2012, at p.81.

for tugs are higher or lower than the rates pursuant to the Article 14 assessment method used in the *Nagasaki Spirit* case which was dependent on usage of a particular tug in a particular year.[478]

Incidentally and importantly, the tariff has embedded in it a profit element regardless of whether it is sufficient in terms of "profitability as opposed to risk". It is contended that it is possible for salvors to earn a little profit. As stated by one author, "… the profit is not sufficient to justify, in terms of profitability as opposed to risk, their involvement in preventing and mitigating pollution damage when salvage reward cannot cover their cost".[479]

Out of Pocket Expenses

While tariff rates deal with the salvor's own personnel and equipment, out of pocket expenses means "all those monies reasonably paid by, for and on behalf of the Contractor to any third party and in particular includes the hire of man, tugs, other craft and equipment used and other expenses reasonably necessary for the operation."[480] The arbitral tribunal in *The Tasman Spirit* case decided that "out of pocket expenses" is not simply limited to the costs of the salvage itself but may include payments reasonably made for demobilizing personnel and equipment.[481]

Bonus

Unlike the increment in Article 14.2 representing the salvor's actual and proven success in preventing or mitigating damage to the environment, SCOPIC provides a standard 25% bonus to the Contractor on the amounts of the tariff rates and the out of pocket expenses, regardless of whether there is success in preventing or

[478] "SCOPIC Amendment to Lloyd's Open Form: Part 1" published by West of England Association in *P&I International*, November 1999 at p. 259.

[479] See Archie Bishop, Essay 24 'Places of Refuge – Environmental Salvage' in Norman A. Martínez Gutiérrez (ed), *Serving the Rule of International Maritime Law*, Routledge, 2010.

[480] Clause 5(iii) of SCOPIC 2018. They will be agreed at cost, PROVIDED THAT: (a) If the expenses relate to the hire of men, tugs, other craft and equipment from another ISU member or their affiliate(s), the amount due will be calculated on the tariff rates set out in Appendix "A" regardless of the actual cost. (b) If men, tugs, other craft and equipment are hired from any party who is not an ISU member and the hire rate is greater than the tariff rates referred to in Appendix "A" the actual cost will be allowed in full, subject to the Special Casualty Representative ("SCR") being satisfied that in the particular circumstances of the case, it was reasonable for the Contractor to hire such items at that cost. If an SCR is not appointed or if there is a dispute, then the Arbitrator shall decide whether the expense was reasonable in all in the circumstances. (c) Any out of pocket expense incurred during the course of the service in a currency other than US dollars shall for the purpose of the SCOPIC clause be converted to US dollars at the rate prevailing at the termination of the services.

[481] De La Rue & Anderson, at. p. 576.

mitigating damage to the environment.[482] The simplicity and certainty of a fixed bonus, exclusive of having to prove success, and the arbitrator exercising discretion in setting its percentage, was welcomed by the commercial market.

However, in circumstances where the salvor hires personnel and equipment in excess of the tariff rates which is often the case, SCOPIC remuneration can be reduced to the actual cost incurred plus 10% of the cost or the tariff rate plus 25% of the rate, whichever is greater.[483] It is notable that the bonus rate was fixed at 25% because at the time SCOPIC was negotiated, the average uplift under Article 14(2) in arbitrated cases was 26%. The drafters of the SCOPIC Clause decided that a general and fixed uplift of 25% in all cases would be appropriate.[484]

7.2.6. Liability to Pay SCOPIC Remuneration

Under SCOPIC, the reward for salving maritime property remains to be assessed according to Article 13 of the Salvage Convention 1989 on a purely "no cure no pay" basis, as provided in the main agreement. In reflecting the correlation between the Article 13 reward and Article 14 special compensation, SCOPIC remuneration as the replacement of special compensation is only payable by the shipowner, and only to the extent that it exceeds the principal amount of the Article 13 reward before currency adjustment, interest and costs, or if there is none, any potential amount.[485]

The procedure for payment of SCOPIC remuneration varies according to the availability of an Article 13 reward. In this regard, the SCOPIC Clause provides as follows: "[I]f there is no potential salvage award within the meaning of Article 13 as incorporated into the Main Agreement then, subject to Appendix B(5)(c)(iv), the undisputed amount of SCOPIC remuneration due hereunder will be paid by the owners of the vessel within 1 month of the presentation of the claim; " and "[I]f there is a claim for an Article 13 salvage award as well as a claim for SCOPIC remuneration, subject to Appendix B(5)(c)(iv), 75% of the amount by which the assessed SCOPIC remuneration exceeds the total Article 13 security demanded from ship and cargo will be paid by the owners of the vessel within 1 month and any undisputed balance paid when the Article 13 salvage award has been assessed and falls due." [486] Simply stated, in the absence of a potential salvage award, the

[482] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review,* Vol. 37:65, 2012, at p. 82.

[483] Clause 5(iv) of SCOPIC 2018.

[484] ISU, "Special Compensation – the SCOPIC Clause", *The Quarterly Newsletter of ISU*, Q4, December 2016, at p.12.

[485] Clause 6 of SCOPIC 2018.

[486] Clause 8(i) of SCOPIC 2018.

shipowner must pay the SCOPIC remuneration within a month of the presentation of the claim. This assumes that that the claim is not disputed. If there is a potential salvage award forthcoming, 75% of the amount by which the assessed SCOPIC remuneration exceeds the amount of the security assessed for the salvage award is payable by the shipowner within a month. The provisions have been designed to ensure that salvors can recover their SCOPIC entitlements expeditiously.

It may well be that no salvage reward is given because the parties, that is, salvors and salvees, have agreed to a settlement. In such situations, SCOPIC remuneration is payable for the amount in excess of the settlement figure, but it is important to note that the shipowner is not bound by any settlements reached with other salved interests. The shipowner may argue that its potential liability to pay was greater than the settled amount that the salvor accepted. If there was no award because no property was saved, the potential award would be zero and the shipowner would be liable to pay the SCOPIC remuneration for the assessed amount in full.[487]

As in the case of special compensation under Article 14, the liability to pay SCOPIC remuneration rests on the shipowner alone. Thus, SCOPIC remuneration is not treated as a general average expenditure to the extent that it exceeds the salvage award; no reimbursement of the shipowner's liability for SCOPIC remuneration is claimable as general average or is indemnifiable under the hull and machinery policy of the ship.[488]

7.2.7. Counterbalancing Devices

As previously indicated, the right to invoke SCOPIC rests solely with the Contractors who might face the risk of not being covered by either the special compensation or SCOPIC in circumstances where they fail to invoke SCOPIC in time or SCOPIC is later terminated. They, therefore, are likely to invoke SCOPIC at the earliest opportunity, even on the first day of the salvage operation, to avoid such risk in every case since they would have nothing to lose but everything to gain by establishing a claim to SCOPIC remuneration, if there is no counterbalancing device to deter them from doing so. Thus, with the intention of reaching a balance, the drafters of SCOPIC designed the Discount Clause and the Termination Clause as protection for shipowners so that SCOPIC is invoked only when it is reasonable and necessary.[489]

---

[487] De La Rue & Anderson, at. p. 578.

[488] Clause 15 of SCOPIC 2018. Liability distribution between property underwriters and liability insurers in a salvage case involving pollution damage is discussed in Chapter 9 of this thesis.

[489] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 2012, at p.83.

Discount

It is important to note that in general an Article 13 reward must not to be diminished simply because of the advantages and convenience of SCOPIC remuneration as the exception to the principle of "no cure no pay".[490] However, as a deterrent for salvors invoking SCOPIC blindly, if the principal amount of an Article 13 reward before currency adjustment, interest and costs, either determined by the arbitrator or negotiated as a settlement, exceeds the assessed SCOPIC remuneration, the Article 13 reward is to be discounted by 25% of the difference between it and the SCOPIC remuneration. In some cases, the Contractor may not invoke SCOPIC immediately but may decide to do it later, after the condition of the subject matter of the casualty has deteriorated considerably, due to the occurrence of an unexpected fortuity during the course of the operation.[491] In such circumstances, regardless of the actual date on which SCOPIC was invoked, the quantification of the remuneration would be the one that would have been assessed had it been invoked on the first day of salvage services; and the discount would be based on the difference, if any, between that calculation and the amount of the Article 13 reward. Another situation is not addressed by the Discount Clause, that is, where the shipowner terminates his obligation to pay SCOPIC remuneration but the Contractor continues salvage services to earn an Article 13 reward. In the view of De La Rue, the discount would also be based on the difference between that reward and SCOPIC remuneration assessed as if it had been invoked for the whole period of the services.[492]

Therefore, the decision to invoke SCOPIC must be taken by the salvor after due thought and consideration as to the prospect of success in saving the maritime property; otherwise he may be faced with adverse consequences. Statistics show that the discount clause actually works because salvors invoke the SCOPIC Clause in just over 20% of cases.[493] The discount no doubt is of benefit to the property underwriters but not to the P&I Clubs. The property underwriters are responsible for indemnifying the reduced Article 13 award, but the P&I Clubs pay for the special compensation or SCOPIC remuneration. It seems it was a conscious decision to reward property insurers in light of the requirement for salvors to exercise their skill and efforts to prevent or reduce damage to the environment. That, in turn, allows enhancement of the salvage award which the property insurers have to pay.[494]

---

[490] Clause 6(iii) of SCOPIC 2018.

[491] De La Rue & Anderson, at p. 579.

[492] Clause 7 of SCOPIC 2014.

[493] See LOF Statistics, Lloyd's official website, available at http://www.lloyds.com/lofstatistics.

[494] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol.37:65, 2012, at pp.83-84.

Termination by the Shipowner

The right of termination was first introduced in LOF 1995 to allow shipowners to terminate the salvage agreement when there was little hope of success in saving the property. The purpose was to enable shipowners to terminate the whole salvage operation to avoid paying the special compensation under Article 14.[495] Under the subsequent LOF 2000, a similar right of termination was granted to salvors.[496] The notion of termination was naturally imported into SCOPIC. It differentiated the shipowner's right to terminate his liability to pay SCOPIC remuneration and the Contractor's right to terminate his services both under SCOPIC and the main agreement. Nevertheless, both parties' rights of termination are subject to the legitimate objections that may be made by official authorities for demobilization of the salvors' equipment.[497]

Under Clause 9(i) of SCOPIC 2018, the shipowner is entitled to terminate his obligation to pay SCOPIC remuneration at any time after giving at least 5 clear days' notice to the Contractor. Notably, throughout the period of notice, SCOPIC remuneration continues to be assessed at tariff rates. The rates are also applied to any demobilization time which reasonably exceeds the five days' notice period. The shipowner's right to terminate under SCOPIC applies only to his obligation to pay SCOPIC remuneration; it has no effect on the rights or other obligations of himself and any other party under SCOPIC and the main agreement. The Contractor remains entitled, but is duty bound to continue his services to salve property at risk and earn a salvage reward under Article 13.[498]

Even though the International Group of P&I Clubs have agreed to advise shipowners not to exercise the right to terminate without reasonable cause,[499] if the shipowner does so, the Contractor can no longer enjoy the financial protection of SCOPIC or Article 14 special compensation of the Convention and could well be saddled with an LOF contract that is potentially unprofitable, but he will continue to be under the legal obligation to complete the services. In essence, this would not be fair for the Contractor if he entered into the LOF with the hope and expectation of obtaining SCOPIC remuneration only to subsequently find that the shipowner had terminated

[495] Clause 4 of LOF 1995; See also De La Rue & Anderson, 2009, at p. 584.

[496] Clause G of LOF 2000.

[497] Clause 9 of SCOPIC 2018. When drafting the Clause, the drafters thought that the appropriate authorities would object when there was a threat of damage to the environment. See Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review,* Vol. 37:65, 2012, at p. 84.

[498] De La Rue & Anderson, *supra*, note… at p. 585.

[499] Clause 8 of the Code of Practice Between International Salvage Union and International Group of P&I Clubs.

SCOPIC.[500] To protect himself, as mentioned above, the Contractor is entitled to terminate both SCOPIC and the main agreement if no adequate security is provided. It is usually to the salvor's benefit not to terminate his services because of the availability of the SCOPIC remuneration. Termination by the salvor is most likely to happen following the shipowner's notice of terminating his liability to pay SCOPIC remuneration. The salvor's right to terminate the whole of the salvage services has the effect of another restraint on the shipowner from unreasonably terminating SCOPIC which serves as a counter-balance.

Viewed from a practical standpoint, a decision to terminate salvage services may not necessarily lead to the contractor's personnel and equipment being demobilized. In some instances, further services may be needed, such as for example, where removal of a wreck is required. Often these are provided by the same contractor but under a new contract which usually does not reflect the features of traditional salvage. Typically, the shipowner issues a notice signifying termination of his obligation to pay SCOPIC remuneration. The object in such a case is to have a wreck removal contract providing lower daily rates, replacing the salvage agreement.[501]

There is a universal restriction on exercising the right to terminate, where there is an objection raised by "government, local or port authorities, or by any other officially recognized body having jurisdiction over the area where salvage services are being rendered" to demobilize the salvor's equipment.[502] Such kind of restraint usually reflects concern on the part of the coastal state authorities that if the vessel proves not to be salvable, it may be abandoned. Authorities obviously would want the operations to continue for removal of whatever remains of the wreck. It is often difficult to enforce wreck removal orders. Coastal state authorities perceive restraining salvors from demobilizing their personnel and equipment, as a strategy for forcing them to undertake wreck removal and complete the task satisfactorily. English courts have decided that if demobilization is prevented as a result of personnel or equipment being detained by coastal state authorities as security for pollution claims, such situations would be covered by restraint actions.[503]

In many instances, such restraint creates complications for the shipowner in transiting from salvage to wreck removal operations. It does not necessarily compel the salvor to remove a wreck that would otherwise be abandoned anyway. It has been found to be mutually convenient for both parties to terminate a salvage agreement and enter into a wreck removal contract. In such a case, the services may

[500] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 2012, at p. 84.

[501] De La Rue & Anderson, 2009, at p. 586.

[502] Clause 9(iii) of SCOPIC 2018.

[503] De La Rue & Anderson, 2009, at pp. 586-587.

continue seamlessly without restraints imposed officially having any effect in practice. However, in the event bids are submitted in response to a call for tenders for removal of the wreck, it may well be that a particular bid is preferred. But given that the original salvor is already on site, the shipowner may not be inclined to instigate a call for tenders and entertain outside bidders and rather engage the original salvor.

7.2.8. The Representatives

As mentioned, the pre-SCOPIC salvage regime exposed numerous instances of inadequacies with respect to special compensation under Article 14. One was the paucity of information made available to and the scarce involvement of insurers during the course of salvage operations, as a result of which, they were reluctant to bear the burden of payments. This was particularly true of the P&I Clubs who were often called in to pay special compensation. To allay this concern, and proactively inform and involve all relevant parties, the appointment of a Special Casualty Representative (SCR) representing all salvage interests and that of Special Representatives acting on behalf of property underwriters including hull and cargo, were introduced by SCOPIC.

The success of the representative system prompted a proposal for the appointment of a Property Salvage Consultant to monitor and report on non-SCOPIC cases and traditional property salvage. This was rejected fearing a proliferation of potential bureaucratic interference. Instead, salvors proposed that the appointed salvage master submit information in standard form to Lloyd's Daily Salvage Report for circulation to interested parties.[504]

Special Casualty Representative (SCR)

Once SCOPIC is properly invoked, the shipowner is entitled at his sole option, to appoint an SCR to attend the salvage operation pursuant to the provisions of the Appendix B. These are published in Lloyd's Website and the SCR Digests published by the SCR Committee from time to time.[505] The SCR is selected from a panel (the SCR panel), appointed by the SCOPIC Committee which consists of 12 representatives evenly allocated among the International Group of P&I Clubs, ISU, IUMI and ICS.[506] To make SCOPIC a living and dynamic instrument, the SCOPIC Committee is obliged to run a review on the tariff rates in Appendix A every three

[504] "ISU opposes concept of the 'Property Salvage Consultant'", *The Quarterly Newsletter of ISU*, Q 4, December 2014, at p.1.

[505] https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/scopic

[506] Clause 1(a), Appendix B to SCOPIC 2018.

years and on the SCR Panel members annually.[507] Similar to the Contractor, the SCR has a primary duty to use his best endeavours to assist in salving the property, and in doing so, to prevent, mitigate and contain damage to the environment.[508] With that intention in mind, the SCR represents and reports to all salved interests to keep them informed on a daily basis. As the SCR is concerned with the general interest of all parties, conflict is avoided, and its independence is virtually guaranteed by a stipulation that he cannot be called upon by any of the parties to give evidence relating to issues not involving salvage;[509] such as for example, the cause of the casualty, matters potentially affecting insurance coverage, cargo claims or other likely disputes.[510]

There must be cooperation between the Salvage Master and the SCR during the salvage operation to the extent that the former must consult with the latter if circumstances allow.[511] The Salvage Master must keep the SCR informed of his plan, condition of the casualty, progress of operation and personnel and equipment used.[512] He must heed any advice given by the SCR, but the final decision is his and the overall charge of the salvage operation or any aspect of it, is always left to him.[513] The SCR has no authority or power to bind the owners of the salved property, but there is no doubt that whatever he says or advises, carries weight. The SCR may endorse the Salvage Master's Daily Salvage Reports, if he is satisfied, or if he is not, must issue a dissenting report. All reports and communications are sent to the interested parties and to Lloyd's.[514] Most notably, the SCR has an important role to play in SCOPIC situations, and with the advantage of tariff rates and Daily Salvage Reports, today it is possible for ship and cargo owners and their respective insurers to be aware of and constantly watch the costs of salvage operations as well as environmental services on a daily basis. The resultant transparency and predictability in the SCOPIC Clause spells a significant improvement over the Article 14 special compensation regime.[515]

---

[507] Clause 1(b) and (c), Appendix B to SCOPIC 2018.

[508] Clause 2 of Appendix B to SCOPIC 2018.

[509] Clause 12 of SCOPIC 2018.

[510] De La Rue & Anderson, 2009, at. p. 571, in particular footnote 285 at that page.

[511] If there is no Salvage Master then it must be the principal contractor's representative on site.

[512] Clause 4(a), Appendix B to SCOPIC 2018.

[513] Clauses 3 and 4 of Appendix B to SCOPIC 2018.

[514] Clause 5(c)(i), Appendix B to SCOPIC 2018.

[515] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989", *Tulane Maritime Law Review*, Vol. 37:65, 2012, at p. 85.

Special Representatives

Special consideration was given to property insurers being represented during the drafting of SCOPIC. This led to a provision enabling the appointment of a Special Hull Representative to represent hull and machinery insurers and a Special Cargo Representative appointed on behalf of cargo underwriters, usually technical persons, not lawyers, on site.[516]. They are collectively referred to as "Special Representatives". The Special Representatives' main task is to "observe and report"; for which purpose, they are granted access to the vessel and relevant information, and are given other rights as governed by Appendix C to SCOPIC 2018.

7.2.9. Duties of the Contractor

The Contractor bears the same duties and liabilities under SCOPIC as under the main agreement LOF, *i.e.,* primarily to use his best endeavours to salve the property, and in doing so to incidentally prevent or minimize damage to the environment.[517] Reflecting Article 18 of the Convention, Clause 11 of SCOPIC 2018 provides for that if there is misconduct or gross negligence on the part of the contractor, he is to be deprived of SCOPIC remuneration to the extent that the salvage operations have become necessary or more difficult or prolonged, or the salvage fund has been reduced or depleted.

7.3. Implications of SCOPIC

Since its inception, SCOPIC seemed to have progressively struck the right balance between the adversarial positions adopted by the shipowners and their P&I Clubs on the one side and the salvage industry on the other. It has been instrumental in dealing with salvage services relating to prevention and mitigation of pollution damage. The significant decrease in reliance on Article 14 by salvors since the adoption of SCOPIC is evidently a measure of its success and workability.[518] SCOPIC has been invoked in about 30% of LOF cases and only 9 out of a total of 329 SCOPIC cases have proceeded to arbitration[519] although it must be conceded that with changing circumstances, periodic review is necessary.

---

[516] Clause 13 of SCOPIC 2018.

[517] Clause 10 of SCOPIC 2018.

[518] The relevant data can be found in the Archive Document of Lloyds, https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/archive-documents.

[519] ISU, official website, http://www.marine-salvage.com/overview/no-cure-no-pay/

Arguably, SCOPIC features balancing and counter-balancing measures producing an equitable platform for the interested parties. Given that Article 14 special compensation was notorious for being a time and cost consuming assessment process, SCOPIC seems to provide a more certain and efficient device for assessing remuneration. Be that as it may, there are several *pros* and *cons*.

From the perspective of salvors, they are relieved of the burden of proving the existence of a threat of damage to the environment for claiming SCOPIC remuneration. Also, they are guaranteed the Initial Security and the Increased Security for the enforcement of their claims. Most importantly, the market-inspired tariff rates in SCOPIC include a profit element. On the downside for them, the bonus or increment is fixed at 25%, capping the remuneration regardless of the degree of success or the salvor's efforts expended in containing pollution damage. Bearing the risk of the shipowner terminating the obligation to pay SCOPIC remuneration is another downside for the salvor.

As a benefit to shipowners and their P&I clubs, SCOPIC remuneration is more predictable given the fixed rates and the capped bonus. The services carried out by salvors are more controllable since shipowners are well informed and involved in the operations. They can terminate their obligation to pay remuneration at any time. But in terms of the downside for them, shipowners have to put up with market rates incorporated in SCOPIC remuneration whereas under the special compensation regime no profit element is allowed to be included.

It is apparent that SCOPIC is imperfect in numerous ways. Among others, one drawback is the discount clause as it stands. In the calculation of the discount, the SCOPIC remuneration must be assessed assuming that the clause had been invoked on the first day. Thus, the salvor is not penalized for invoking the clause late. This safeguard is not available in Clause 9 regarding termination. If the shipowner terminates SCOPIC under Clause 9 (i) and the salvor continues providing salvage services, as he must, the discount will increase with each day because the calculation of SCOPIC remuneration has been discontinued. This occurs notwithstanding the fact that the salvor is no longer protected by either SCOPIC or Article 14.[520]

The effectiveness of SCOPIC is largely dependent on the willingness of all parties concerned to make it work. In this regard, salvors seem no longer to be satisfied with SCOPIC claiming that it remains only a safety net to ensure a minimum payment in difficult cases rather than providing a proper method for remunerating salvors for protecting the marine environment. It is their current position that incentives to encourage salvors to engage in environmental services are grossly

[520] Stuart Hetherington, "Discussion Paper for review of Salvage Convention 1989" for International Sub-Committee Meeting: 12 May 2010, *CMI Yearbook* 2010, at p.392.

inadequate. The veracity of that contention is still under debate.[521] In recent times, environmental issues have dominated almost every salvage operation, leading salvors to claim that they should be entitled to a separate "environmental award" in situations where they have minimized or prevented damage to the environment. This has led to a call for a review of the 1989 Salvage Convention by the salvage industry through the ISU. In the view of this author, an alternative proposition needs to be explored to diffuse the debate. This is addressed in Chapter 11 of the thesis.

7.4. Contractualization of the Salvage Agreement

It must be apparent from the discussion above that SCOPIC operates as an alternative to the customary and convention law governing salvage.[522] It has pushed salvage law further away from the "no cure no pay" principle which gave it a *sui generis* character, and moved it closer to the realm of contract law. Unlike the main agreement in which consideration is not provided and left open for arbitrators to decide, SCOPIC, despite being an optional addendum, provides for fixed and certain consideration for salvors' environmental protection services, through the mechanism of a market inspired tariff reviewed every three years, out-of-pocket expenses and a fixed bonus. Success is an important factor for increasing the amount of special compensation under Article 14 of the Convention, but SCOPIC gives no consideration to success in preventing or mitigating damage to the environment. It is virtually unconnected to the principles of traditional salvage and stands simply as a contract comprising a set of add-on contractual provisions applicable in salvage cases involving pollution.

SCOPIC is evolutionary in that it introduces the notion of contractualization of the environmental aspect of salvage. The tendency to contractualize is even eroding the norms associated with property salvage. The fact that there is a significant decline in the use of the LOF is now of widespread notoriety in the maritime field. One major reason is the decrease in maritime casualties attributable to the increasing standards of maritime safety and compliance with the requisite rules and standards. There is also increasing pressure from the insurance industry to steer away from LOF where possible because they consider it to be at once uncertain and expensive.

[521] Huiru Liu, "Environmental Salvage: 'No Cure-No Pay' in Transition", 23 *Journal of International Maritime Law*, 2017, at p. 289.

[522] *Ibid*.

Instead, side agreements to cap LOF rewards and contract salvage have become popular practice.[523]

In responding to this state of affairs, the Admiralty Solicitors' Group (ASG), seemingly inspired by SCOPIC has proposed a new version of LOF, referred to as "LOF Light", to introduce the tariff plus bonus system for rewarding salvors' for saving maritime property under Article 13 of the Salvage Convention 1989.[524] Under the proposed LOF Light, the assessment of salvage reward under Article 13 is based on SCOPIC tariff rates. A further negotiated bonus being the encouragement is granted if the service is successful. However, LOF Light faces firm objection from salvors represented by ISU.[525] Be that as it may, SCOPIC addressing environmental protection services and LOF Light dealing with saving of maritime property are indications of a tendency within the maritime community to contractualize salvage agreements.

[523] "Is The Salvage Industry In Terminal Decline? LOF v Commercial Contracts", Clyde & Co., http://www.mondaq.com/uk/x/652920/Contract+Law/Is+The+Salvage+Industry+In+Terminal+Decline+LOF+V+Commercial+Contracts.

[524] Nigel Lowry, "Salvors and Insurers Mull Proposed New LOF Contract", Lloyd's List, 20 September 2018.

[525] ISU, "A New Vision for The Salvage Industry", 25 October 2018, ISU official website, http://www.marine-salvage.com/media-information/our-latest-news/international-salvage-union-a-new-vision-for-the-salvage-industry/. The ASG met in November 2018 to deliberate on "LOF Light"; its outcome will certainly be of interest

8. Environmental Protection Services

"What exactly is environmental salvage other than jargon?"

(Proshanto K. Mukherjee, "Salvage at Crossroads; Some Idle Thoughts and Reflections", *Current Problems in International Maritime Law, Liber Amicorum in Loving Memory of Prof. Dr. A.N Yiannopoulos*, Ankara: Adalet Yayinev, 2017, at p.338)

8.1. Introductory Remarks

The very core of this thesis, to put it in terms without a specific label, is a thorough legal examination of the environmental implications of salvage operations necessitated by a marine casualty. Unmistakably, so far in this thesis, this has in some quarters been reluctantly referred to as the phenomenon of "environmental salvage". In using this terminology, the author has, among other academic sources, taken the cue from Lord Mustill's reference to "an entirely new and distinct category of environmental salvage…" in the case of *The Nagasaki Spirit.* What precisely is "environmental salvage" as it is popularly known, and whether or not this appellation makes full sense in legal and practical terms, and fits the conceptual essence of what is contemplated by the interested parties, is carefully examined through which the essential nature of the involved services can be clarified.

In pursuing that object, it is necessary to backtrack to the evolutionary process of the phenomenon of "environmental salvage" as to what has been discussed and probe further into the current proposed law reform in order to have a comprehensive understanding of the legal implications of the environmental dimension in the delivery of protection services by salvors. To put it in contextual perspective, in this chapter, the expression "environmental salvage" is microscopically examined to determine the correctness and accuracy of its usage together with the resultant implications and look into whether some other description or appellation might better fit the essence of the perceived concept.

8.2. Further Law Reform Advocated by International Salvage Union (ISU)

Even though SCOPIC has seemingly dealt with the problem of assessment of special compensation under Article 14, the salvage industry contends that it still only covers the expenses incurred by the salvor in relation to prevention and mitigation of environmental damage in ship-source pollution cases in the absence of successful preservation of property. The disgruntled salvage industry, no longer being entirely satisfied with the present arrangements, including Article 14 Special Compensation and SCOPIC, continues to seek a stand-alone autonomous regime giving a reward to or remunerating those providing services to prevent or mitigate damage to the environment following a pollution incident. This is contemplated as independent of saving maritime property which has traditionally been the *raison d'etre* for a salvage reward.

Therefore, in recent times, salvors supported by property underwriters have been proposing what has come to be known as "environmental salvage" as a regime running parallel to or concurrently with property salvage. If this were to eventually materialize, it would represent a radical change in the treatment of rewards payable to salvors, who, as mentioned above, are the most eligible and suitable ones professionally capable of dealing with such environmental situations generated by ships at sea. A synoptic overview of their recent efforts is presented below chronologically.

Following the creation of SCOPIC, the call for further change was first raised by the ISU representing the professional salvage industry with the Lloyd's Form Salvage Group. It is the responsibility of this body to update the LOF in keeping with the needs of the maritime industry as a whole. The Group established a Sub-Committee comprising representatives of the International Group of P&I Clubs, the International Chamber of Shipping (ICS) and the ISU. Between 2007 and 2008, the Sub-Committee discussed the proposal of the ISU in great detail at several meetings but the participants were deeply divided and unable to reach a consensus. Essentially, two camps emerged from the deliberations; the ISU and property insurers as protagonists in support of change, and the shipowners together with their P&I Clubs as antagonists fiercely opposed to the proposition insisting on maintaining the *status quo*.[526]

Following this failure, the ISU then decided to approach the CMI to include in the latter's agenda, a full review of the Salvage Convention, 1989, which would obviously include the proposition advocating a stand-alone regime for rewarding

[526] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention, 1989", *Tulane Maritime Law Journal*, Vol. 37, 65 at pp. 89-90.

salvors in relation to preventing or minimizing environmental damage, and ostensibly be dominated by it. An International Working Group (IWG) established by the CMI to deliberate on the issue, solicited the views of national maritime law associations, members of the CMI, through a questionnaire in 2009. Some 26 national maritime law associations responded to the questionnaire circulated by the IWG following which two rounds of discussions were held; first at a meeting in London in May 2010 where the topic was broached and the second at a CMI Colloquium in Buenos Aires in October, 2010.[527] Subsequently, a second questionnaire was sent to the same 56 national maritime associations seeking empirical evidence supporting ISU's proposal. At the CMI Conference held in Beijing in October 2012, the ISU's Proposal was deliberated extensively and rejected. The IWG presented a comprehensive report on the matter.

8.2.1. ISU's Proposal

ISU proposed a review of the Salvage Convention 1989 to amend mainly Articles 13 and 14 with the aim of introducing an autonomous "environmental award". Despite ISU's proposal being rejected at the CMI level due to lack of agreement among the members, it is nevertheless necessary to examine it closely to be able to gain an insight into the perspective of the salvage industry and a full understanding of it with respect to the environmental dimension of salvage.

In its "Position Paper on the 1989 Salvage Convention" submitted to CMI, ISU proposed on behalf of the salvage community, that a revised Article 13 with the original Article 13.1(b) removed and incorporated into a revised Article 14.

Revised Article 13

The revised Article 13 in the Proposal is cast as follows:

> Article 13 - Criteria for fixing the reward
>
> 13.1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:
>
> (a) the salved value of the vessel and other property;
>
> (b) the measure of success obtained by the salvor;
>
> (c) the nature and degree of the danger;

[527] See *CMI Yearbook* 2011-2012, pp. 150-152.

(d) the skill and efforts of the salvors in salving the vessel, other property and life;

(e) the time used and expenses and losses incurred by the salvors;

(f) the risk of liability and other risks run by the salvors or their equipment;

(g) the promptness of the services rendered;

(h) the availability and use of vessels or other equipment intended for salvage operations;

(i) the state of readiness and efficiency of the salvor's equipment and the value thereof.

(j) any reward under the revised Article 14

13.2 and 13.3 remain unchanged

13.4 For the avoidance of doubt no account shall be taken under this article of the skill and efforts of the salvor in preventing or minimizing damage to the environment.

The major changes to Article 13 are the deletion of the text of the old sub-paragraph (b), the addition of a new sub-paragraph (j) and a new paragraph 4 which is simply a restatement of the deletion of the old sub-paragraph (b) for the sake of clarity. Interestingly enough, addition of the old sub-paragraph (b), being "the skill and efforts of the salvors in preventing or minimizing damage to the environment" as a factor to be considered in assessing the traditional salvage rewards, was the very result of the revision of the Salvage Convention 1910. Ironically, the ISU Proposal to review the Salvage Convention 1989 aims to remove that result and revert back to the 1910 Convention in this matter.

Revised Article 14

The most revolutionary change proposed by the ISU centers on Article 14. It is proposed that the original text of that Article be replaced with a suitable provision reflecting an "environmental award", with the original heading of "Special Compensation" being retained. The revised Article 14 in the ISU proposal reads as follows:

Article 14 - Special Compensation

14.1. If the salvor has carried out salvage operations in respect of a vessel which by itself, or its bunkers or its cargo, threatened damage to the environment he shall also be entitled to an environmental award, in addition to the reward to which he may be entitled under Article 13. The environmental award shall be fixed with a view to

encouraging the prevention and minimization of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

(a) any reward made under the revised Article 13;

(b) the criteria set out in the revised Article 13.1(b) (c) (d) (e) (f) (g) (h) and (i);

(c) the extent to which the salvor has prevented or minimized damage to the environment and the resultant benefit conferred.

14.2 Any reward payable by the Shipowner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to;

(a) In respect of a vessel of 20,000 Gross Tons or less, 'x' Special Drawing Rights.

(b) For a vessel exceeding 20,000 Gross Tons, 'x' Special Drawing Rights, plus 'y' Special Drawing Rights for each ton in excess of 20,000, subject always to a maximum of 'z' Special Drawing Rights.

14.3. For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.

14.4 Any environmental award shall be paid by the shipowners.

14.5 If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any environmental award due under this article

14.6 Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

The proposed new Article 14.1 as the focus of the revision, states clearly that salvors should be rewarded for their efforts in protecting the marine environment in the course of carrying out salvage operations and how that is to be done. The ISU has proposed two separate and independent payments; one being a reward for salvage services to save property, and the other, an autonomous "environmental award" for services to prevent or mitigate damage to the environment. Salvage rewards should be ascertained according to the revised Article 13 and the "environmental award" should be fixed entirely at the discretion of the tribunal bearing in mind the public policy to encourage environmental protection services taking account of the criteria set out in the revised Article 14.1.

As can be seen from the proposed revision, a salvor is entitled to an "environmental award" once he has carried out a salvage operation associated with the vessel, or its bunkers or cargo which "threatened damage to the environment". The environmental award is not limited to salvor's expenses comprising the "out-of-pocket expenses" and the "fair rate for equipment and personnel" as in the special compensation regime set out in the original Article 14. Also, actual and successful prevention or mitigation of damage to the environment is no longer a condition for a discretionary uplift of salvors' expenses as required in the original Article 14.2, but a factor to be taken into account by the tribunal when quantifying the "environmental award". It is noted that the revised Article 14.1(c) involves not only the degree of success of the environmental protection services but also its resultant benefit conferred as factors to be considered by the tribunal.

In this vein, it may be postulated that there are two categories of beneficiaries of the environmental protection services. One is the shipowner polluter whose liability may be averted or reduced. The other is the entity who owns the environment in question or who stands as custodian of it on behalf of the public who enjoy the intangible benefits of a clean marine environment. The benefit accruing to the general public will exist regardless of location but that accruing to the shipowners is likely to vary in different waters. "If there was a threat of pollution in waters that would impose a liability on the owner, the award would be more than if it had been in waters which did not impose such a liability, for the benefit conferred would be that much greater".[528]

Another important proposed revision of Article 14 is that the "environmental award" ceases to be affiliated with the salvage reward governed by Article 13. As explained in Chapter 5, the special compensation payable (SCP) set out in the original Article 14 is the difference between the special compensation assessed (SCA) and the salvage reward made under the original Article 13. In contrast, the revised Article 14 provides for an autonomous "environmental award" assessed entirely by the tribunal at its discretion with the requirement to consider "any reward made under the revised Article 13". In every aspect, the environmental award is independently parallel to the salvage reward under the revised Article 14.

The revised Article 14.2 establishes a maximum limitation of the new "environmental award" which only involves the gross tonnage of the vessel in question and with a "to-be-decided" multiplier of Special Drawing Rights. In comparison, the maximum special compensation which salvors are entitled to receive under the original Article 14 is twice the expenses. Notably, there was

[528] "ISU Position Paper on the 1989 Salvage Convention" (hereunder referred to as "ISU Position Paper"), available at the official website of CMI, http://comitemaritime.org/Uploads/Salvage%20Convention/ISU%20Final%20Position%20Paper%20on%20Environmental%20Salvage%20Awards%20April%202012.pdf.

initially another method proposed to ascertain the cap of the environmental award which looks to the shipowner's limitation fund under other conventions apart from CLC 1992, namely, HNS Convention 1996, Bunkers Convention 2001, the 1996 LLMC Protocol and their respective successors whichever one may be appropriate to the circumstances of the case.[529] That method was abandoned to avoid confusion regarding which convention should be the appropriate one to apply.

The revised Article 14.3 aims to avert salvors' adverse position of competing with third-party claimants and the resultant inevitable delays of the payment.[530] The next provision, Article 14.4, clarifies that liability to pay for the "environmental award" rests on the shipowners who would be responsible for pollution damage suffered by third parties if the salvor had not provided environmental protection services. The revised Article 14.5 speaks to the salvor's liability for his negligence and Article 14.6 deals with the shipowner's right of recourse which should not be affected in any way.

8.2.2. Rationale for the Proposal: Compensation versus Remuneration

The rationale for the proposed law reform was unequivocally stated in the final "Position Paper on the 1989 Salvage Convention". It was contended that "the present system under the Salvage Convention and the commercial arrangements under LOF ... do not provide proper recognition of the salvor's efforts in carrying out his obligations under the 1989 Salvage Convention in avoiding or minimizing damage to the environment". This position was explained in detail by then ISU President Todd Busch at the CMI Colloquium in Buenos Aires who pointedly referred to the inadequacies of both the Salvage Convention, 1989 as well as SCOPIC, in the following words:

> Let me say straight away that we recognize that salvors are in many cases rewarded for protecting the environment by virtue of the Salvage Convention's Article 13.1 (b). However, all too often the tribunal is unable to give full effect to this provision because of the low value of the salved property. Cases that give rise to a material threat to the environment are often of low value compared to the cost and effort involved and it is in these cases that we feel inadequately rewarded. In such cases Article 14 (subsequently replaced by SCOPIC-which has its own problems)

[529] Archie Bishop, The Development of Environmental Salvage and Review of the London Salvage Convention 1989, *Tulane Maritime Law Journal* Vol.37:65, 2012, at p.95.

[530] ISU Position Paper.

> ameliorated the problem by providing compensation so salvors were not "out of pocket" but it has always been a "safety net" rather than a method of remuneration.[531]

He then went on to say that SCOPIC is no different – it is nothing more than a safety net, a device for allowing the salvor to recoup his expenses; and, it applied only in respect of cases where the LOF is used. He added that "[I]t is the injustice of being inadequately paid for the benefit conferred that we seek to correct". In reference to "special compensation" he remarked that the fact that SCOPIC was a substantial improvement over the package provided under the Salvage Convention 1989 through its Article 14 was well recognized, but nevertheless, like Article 14, it was simply a mechanism for giving compensation when an award to cover expenses could not be made. He pointed out in conclusion that SCOPIC was not a method of remuneration which is what is being sought by the salvage industry and vehemently remarked that "salvors would not be in the salvage business if their remuneration was restricted to an Article 14 or SCOPIC award".[532] He further put forward three reasons for review of the present legal framework of rewarding salvors for their efforts in protecting the environment as follows:

First, he contended that the practical situation had changed dramatically since the 1980s when the Salvage Convention 1989 was drafted. One the one hand, thanks to advanced technology and improved management, casualties have been reduced significantly in recent times. This has led to less salvage operations being needed, and correspondingly, less revenue for professional salvors. One the other hand, environmental concerns have dominated nearly every salvage operation resulting in increasing regulatory control and official intervention during provision of salvors' services. Worse still, the tendency of imposing civil and criminal liability on salvors for pollution damage caused during salvage operations without negligence on their part forms a disincentive for them to respond to pollution cases.[533] The encouragement and incentive provided in the Convention drafted 30 years ago has turned out to be inadequate nowadays because of significant changes taking place in the salvage business.[534]

Secondly, "while salvors always work to protect the environment whilst carrying out salvage operations, they are not fully rewarded for the benefit they confer."[535] Salvors have helped to avoid catastrophic pollution by salving massive pollutants

---

[531] Todd Busch, "Fair Reward for Protecting the Environment – The Salvor's Perspective", *CMI Yearbook,* 2010 at pp. 493-494.

[532] *Ibid* at p. 494.

[533] The explanation to this is provided in Chapter 11 of this thesis.

[534] See Todd Busch, "Fair Reward for Protecting the Environment – The Salvor's Perspective", *CMI Yearbook,* 2010, at pp. 494 – 496.

[535] *Ibid* at pp. 495.

which might otherwise have polluted the sea, despite "a lack of financial incentive" under the current legal framework.[536] Such a state of affairs is perceived to be unreasonable by salvors.

Thirdly, salvors in a sense are remunerated, albeit insufficiently, for environmental protection services mainly through Article 13.1(b) where skill and efforts in preventing and mitigating damage to the environment is a mandatory factor to be considered when the tribunal assesses the salvage reward for saving property. This translates into the unjust and unfair fact that shipowners and cargo owners are actually paying, *pro rata* for the salved value of their respective properties for salvors' environmental protection services from which shipowners or their P&I insurers are generally the sole beneficiaries.[537]

The foregoing excerpt from the speech of the President of the ISU aptly expresses the sentiments of the salvage industry in the matter of services being provided by salvors for protecting the marine environment in situations of oil spills at sea.[538]

8.2.3. Rejection of the Proposal

As stated, ISU's proposal was first rejected by the Lloyd's Form Salvage Group, in charge of revising the LOF. ISU then resorted to CMI for a review of the Salvage Convention 1989 to introduce an independent "environmental award". ISU's efforts for law reform culminated at the CMI Beijing Conference in 2012, only to be rejected again due to fierce opposition from shipowners supported by their P&I Clubs. The rationale for their proposal is expressed in their position papers.[539] The positions taken by shipowners and the insurance market including the property underwriters and P&I clubs are set out in detail in Chapter 9.

As a result of the rejection of the ISU proposal, no consensus was reached leaving the issue open and unresolved but the ISU continued to pursue its aim of persuading the maritime community.[540] During the process of promoting its proposal, it made the concept and terminology of the so-called "environmental salvage" widely known and popularly used to refer to the environmental aspect of salvage.

---

[536] *Ibid* at pp. 497.

[537] See *Ibid* at pp. 498.

[538] Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention, 1989", *Tulane Maritime Law Journal*, Vol. 37, 65 at pp. 89-90.

[539] See section 9.5 of this thesis.

[540] "ISU Response to CMI Conference", Beijing October 2012, available at http://www.marine-salvage.com/media_information/Press/ISU%20response%20to%20CMI%20outcome%20Beijing%202012.pdf.

8.3. Environmental Salvage: The Definitional Dilemma

After examination of how the phenomenon of the so called "environmental salvage" has emerged and evolved, the question can be raised whether such appellation reflects its intended meaning and essence accurately and appropriately. It appears to this author that there is a definitional dilemma regarding the term "environmental salvage" centering on whether the services provided to protect the environment in the course of a salvage operation constitutes salvage at all.

In real and practical terms, the object of salvors responding to a casualty at sea is to salve and preserve property and, in doing so, to prevent or minimize damage to the environment usually within the same operation. Under Article 8 of the Salvage Convention, 1989, the salvor is dutybound to protect and preserve the environment. In this author's observation, because salvage services and environment protection are often provided both by salvors simultaneously in the course of a salvage operation, salvors' efforts to prevent or mitigate damage to the environment are misleadingly viewed as a form of salvage. Understandably, both salvors and shipowners as salvees are likely to confuse these two kinds of services which by their very nature are different. A cynical view is that the confusion is deliberate; the two parties on opposites sides of the same coin are simply eager to protect their own interests. Salvors would view environmental protection services as salvage to seek a theoretical underpinning for a more lucrative financial gain while shipowners would have the same view to exclude liability salvage; in other words, to deny aversion of liability as a recognized subject of salvage.

At the heart of the inquiry of a definitional dilemma lies the question - what exactly is the so-called "environmental salvage" which seems to conjure up different connotations in the minds of different people within the maritime community? The precise meaning of the term has not yet been established by any relevant organization, judicial or arbitral authority or in any authoritative literature. For starters, it is submitted that the term is an inaccurate description of services provided by salvors to prevent or mitigate damage to the environment because they do not constitute salvage but rather environmental protection even if they are provided incidental to salvage of property.

It is conceded that "environmental salvage" has been widely used in academic works, in one judicial case and by the ISU on behalf of worldwide professional salvors to promote a separate award for services rendered to contain damage to the environment. Yet, without any endorsement in a legal instrument, it remains a term of art albeit used frequently and loosely, to describe services incidental to salvage operations provided by professional salvors for protection of the marine environment. The common denominator underlying the various connotations in which the expression is used, is that the aim of the services is environmental

protection. In certain quarters, it is believed to be salvage even though salvage proper has only to do with maritime property and not the environment. To unravel the mystery, a pertinent line of inquiry would be - what exactly is "salvage" in the context of "environmental salvage" given the multiple senses in which the term is used and that the involved activities are correlated. The connectivity between salvage and the environment is the place from where an incisive analysis of the definitional dilemma must begin. From this author's perspective, this must start with the concept of "salvage".

Brice defines salvage as a right in law as follows:

> In English law, a right to salvage arises when a person, acting as a volunteer (that is without any pre-existing contractual or other legal duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognized subject of salvage from danger.[541]

In the footnote to the above statement he continues - "the word 'salvage' is sometimes used to mean the salvage remuneration and sometimes to mean the salvage service or the cause of action of 'salvage': it is usually obvious from the context which meaning is intended".[542]

In the Kennedy book, salvage is defined as a service by reference to the view of the Court of Admiralty in the following words:

> …a service which confers a benefit by salving or helping to save a recognized subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.[543]

Kennedy also recognizes that salvage is defined as an operation "when all interests imperiled are brought to safety at the same time. However, in practice, it may be convenient, desirable or necessary for different interests to be dealt with separately at different times."[544] Kennedy goes on to state that "in regard to the preservation of life and property at sea, the word 'salvage' is used indifferently in legal parlance to denote the salvor's service and the salvor's reward".[545]

In the face of the statements made by the stalwarts, this author feels constrained to even suggest a finite definition of "salvage". As was held by Sir T. Erskine Perry

---

[541] Brice, at para.1-01.

[542] *Ibid.*

[543] Kennedy, at p. 7.

[544] *Ibid*.

[545] *Ibid*, at pp. 7-8.

C.J. in *The Lord Dufferin,*[546] "all definitions in law are said to be dangerous".[547] Judicial practice shows that the courts when confronted with a salvage case tend to first decide whether the services in question are indeed salvage services, and if so, proceeds to assess the quantum of the salvage reward.[548] It should be obvious that the above remarks and observations pertain to the word "salvage" in the phrase "environmental salvage".

In relation to the environmental dimension of that phrase, it is to be noted that problematic as it is, a complete definition of "damage to the environment" is in fact given in the Salvage Convention 1989.[549] It should be emphasized as well, that the environment in question is the marine environment; and the pollution causing the impairment or contamination of that marine environment is ship-source pollution, to distinguish the phenomenon from other sources.

Perhaps the most noteworthy point regarding the term "environmental salvage" is that it has been used in only one judicial decision, albeit on two occasions by the same judge as elaborated below.[550] It is conspicuous that in the proposal of ISU to CMI requesting a review of the Convention, the term "environmental award" was used instead of "environmental salvage". But the term has appeared frequently in scholarly literature and public speeches delivered at international meetings and conferences.[551] Seemingly, terms of art of vague definitions are used quite often within the international maritime community as handy expressions to depict an idea in simplistic form, for better or for worse. As such, certain expressions in the law of salvage, such as "no cure no pay" and "safety net" have become norms in daily business and legal use. In the present context, the term "environmental salvage" is another of them.

Lord Mustill in *The Nagasaki Spirit* mentioned the term "environmental salvage" on two occasions in his judgement. Without providing any definition or explanation to that term, he held in reference to the law reform exercises in the 1980s that-

---

[546] (1848) 7 No. C. xxxiii (Bombay S.C).

[547] at pp. xxxiii- xxxiv cited in Kennedy, *supra*, note…in footnote 57 at p. 7.

[548] Edgar Gold, *Canadian Maritime Law, Introductory Materials*, 2nd Edition, Halifax: Dalhousie University, 1978, at p. 439.

[549] This matter has been addressed previously in chapter 5.

[550] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep. 323 at pp. 327 and 332 (H.L.).

[551] For example, Archie Bishop, "The Development of Environmental Salvage and Review of the London Salvage Convention, 1989", *Tulane Maritime Law Journal*, Vol. 37, 65.

> It is important to make clear at the start that the solution devised in the 1980s was not to create a new institution: a kind of free-standing "environmental salvage".[552]

Again, later in his judgement he stated that -

> …the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment…[553]

The inference drawn from the above two passages is that the use of the term "environmental salvage" is indicative of an independent award contemplated by salvors as a financial incentive to reflect their efforts expended to protect the marine environment from ship-source pollution; and that the award is parallel to the traditional salvage award codified in Article 13 of the Salvage Convention, 1989.

From the viewpoint of this author, in substance, the concept of the so-called "environmental salvage" points to services provided by salvors to prevent or mitigate damage to the environment in the course of a salvage operation. In modern times, ship-source pollution often happens following a maritime incident such as collision and grounding, making both saving property and containing pollution necessary at the same time. Salvors are usually the first ones on scene to save property and naturally become the most appropriate entities to also prevent and mitigate damage to the environment with their expertise. Therefore, it is a norm that salvors provide services to preserve property and contain pollution simultaneously in the course of the same salvage operation. This has been made salvors' duty, under LOF and the Convention, to exercise best endeavour (LOF) or due care (Convention) to prevent or minimize damage to the environment in performing the duty to carry out salvage operations assisting property.

It is acknowledged that services provided by salvors to save property and prevent or minimize pollution are commonly concurrent. However, does that make "environmental salvage" a proper appellation of that phenomenon in question? One distinguished author has opined that a name tag of any description should suffice so long as it is properly and adequately defined and explained so as to reflect the connectivity between salvage and the marine environment. But as the same author has pointed out there are issues to be addressed regarding who are the true beneficiaries of the services rendered.[554] The present author is of a somewhat

---

[552] *The Nagasaki Spirit* [1997] 1 Lloyd's Rep. 323 at p. 327.

[553] *Ibid,* at p. 332.

[554] Proshanto K. Mukherjee, "Salvage at Crossroads: Some Idle Thoughts and Reflections", *Current Problems in International Maritime Law, Liber Amicorum in Loving Memory of Prof. Dr. A.N Yiannopoulos*, Ankara: Adalet Yayinev, 2017.

different view. In her opinion, it is more expedient to adopt an appellation which is a clearer description of the nature of the phenomenon.

In view of the above observations, it is submitted that the term "environmental salvage" is misleading and a misnomer in terms of the usage of "salvage" in the context of protection or minimization of damage to the environment. Whereas property salvage is a term indubitably of proper usage recognized under salvage law, arguably, the terms "life salvage", "liability salvage" or "environmental salvage" do not or should not enjoy that recognition simply because salvage is concerned exclusively with maritime property and other subjects. Even property that does not qualify as maritime property has not been considered a subject of salvage as exemplified in the classic case of *Gas Float Whitton No. 2*.[555] In that case, salvors towed to safety, a gas float which had broken moorings and gone adrift. Lord Esher remarked that the argument made by the salvors that the gas float was a ship was "more ingenious than sound".

However, even though it is technically inappropriate to describe saving lives as "life salvage" because the word "salvage" *per se* in the context of maritime law connotes the intention of primarily, if not only, salving maritime property and not in respect of life salvage,[556] in the evolutionary process of salvage law as it has developed over centuries through decisions of the English admiralty courts, life salvage, both in concept and terminology, has come to be recognized, and is now firmly established therein.

In contrast, "liability salvage" surfaced through several admiralty cases but it failed to take root as a concept as life salvage did. The aim of it being to legitimize avoidance of shipowners' liability as a subject of salvage, it has suffered outright and repeated rejection during the drafting of LOF 1980 and of the Salvage Convention 1989 by the international maritime community.[557] It is submitted that the expression "liability salvage" is also a misnomer as strictly speaking it does not constitute an act of saving maritime property. In essence, "environmental salvage" is a part of the already rejected notion of liability salvage which aims to recognize salvors' efforts in avoiding different varieties of shipowner's third-party liabilities. Among them, the particularity of ship-source pollution liability giving rise to the CLC and FUND, HNS and Bunkers conventions, also provides in a similar way, rationale for "environmental salvage" as a phenomenon to stand out.

---

[555] [1896] P.42 (C.A.) affirmed by [1897] A.C. 337 (HL).

[556] See Kennedy, at pp. 124-125. Kennedy also goes on to recognize that "the expression (life salvage) is reasonably clear and convenient, and does no harm provided it is not used without regard to the law as it actually is, and particularly to whether the claimant has rendered a service to life alone or also to property or the environment".

[557] See section 5.3 of this thesis.

8.4. Environmental Protection Services: Proposed Terminology

A maritime accident necessitating a salvage operation to save property may at the same time entail environmental protection services to contain environmental damage during the same salvage operation due to leakage of bunkers or cargo of pollutants and the likes. Salvors are the most suitable entities to provide prevention or mitigation services if environmental damage is involved in salvage operations. This phenomenon has come to be popularly known as "environmental salvage", for better or for worse, and has gained considerable attention within the international maritime community in recent times. However, this author maintains that the fact that those services are provided by salvors while carrying out salvage operations, does not make them salvage in nature. Admittedly, the connotation of the term "salvage" can be expanded and extended to include protection of the marine environment. If it has to bear that name, salvage law needs to go through some radical and revolutionary reform, such as for example, a change in the definition of "salvage operation". This author holds the view that no changes should be made to the age-old traditional concept of salvage and new terminology should be created.

In order to differentiate with salvage services *stricto sensu*, those services provided by salvors to prevent or mitigate damage to the environment in the course of salvage operations can be referred to as "environmental protection services" which does not contain the word "salvage". But the term aptly describes the phenomenon of salvors' efforts to prevent or mitigate damage to the environment.[558] The word "protection" in that phrase connotes prevention of further or secondary contamination and mitigation of initial pollution caused. The term is therefore more accurate and innovative. What is important in the view of this author is avoidance of the word "salvage" in the description of the phenomenon. It is submitted that "environmental protection services" is broad enough to imply that the same services could quite conceivably be provided by other cadre of service providers who are not professional salvors, such as clean-up contractors. However, in the context of this thesis, it is environmental protection services provided by salvors that are under discussion.

Environmental protection services can be provided by commercial salvors independently of salvage operations. Where such services are provided after a salvage operation, they are usually in the form of clean-up work based on contracts. In such case, the service providers should not be treated as salvors as in salvage

[558] Huiru Liu, "Environmental Salvage: 'No Cure-No Pay' in Transition", 23 *Journal of International Maritime Law*, 2017, at pp. 280-294; Huiru Liu, "Salvors' Provision of Environmental Services: Remuneration, Liability and Responder Immunity", 24 *Journal of International Maritime Law*, 2018, at pp. 284-300.

operations because salvage law does not apply to the provision of environmental protection services unconnected with salvage operations.[559] It is submitted that in such instances "responders" is a better description of the service providers.[560] Needless to say, at any rate, such services may be provided by salvors in conjunction with salvage operations conducted to save property. This is the intended connotation of the term "environmental protection services" in so far as this thesis is concerned.

The reason for proposing new terminology for services provided by salvors in preventing or mitigating pollution damage is to distinguish it from the established legal notion and nature of salvage. One distinguished author in explaining Article 14(2) of the Salvage Convention, 1989 refers to the prevention or reduction of environmental damage as a "collateral effect of the salvage operation", rather than an action aimed at that result.[561] A similar view has been expressed by another distinguished author who has stated that, under the existing salvage regime, any measures taken by a salvor to prevent or minimize pollution damage are measures taken to further the salvor's efforts; and therefore, are affiliated to the salvage operation.[562] The present author takes a different view and submits that environmental protection services is an independent service parallel to, rather than an integral part of, salvage.[563] No doubt, in most cases, the need for environmental services arises in the course of a salvage operation, but the aims of the two services, both provided by salvors, are distinctively different. The aim of salvage services is to save property whereas the aim of environmental services is to protect the environment even if in most cases that service happens to be incidental to saving property. The distinction does not seem to be readily appreciated by all in the maritime community.

After making that distinction, it is clear that the existing salvage law governs two different types of services both provided by salvors; that is, salvage and environmental protection services. The law of salvage is of ancient vintage with well-established rules including the "no cure no pay" principle. By contrast, the law on environmental protection services is relatively new. It emerged only in the 1980s in association with the law of ship-source pollution, which is why all the environmental aspects of salvage law including safety net, special compensation and SCOPIC are exceptions to "no cure no pay". By utilizing the term "environmental

[559] See for example, Clause 14 of SCOPIC 2018

[560] See section 11.3.1. in Chapter 11 of this thesis.

[561] Francesco Berlingieri, "The Salvage Convention 1989", [2017] 1 *L.M.C.L.Q*. 26, at p. 53.

[562] Brice, at para. 6-184.

[563] Huiru Liu, "Salvors' Provision of Environmental Services: Remuneration, Liability and Responder Immunity", 24 *Journal of International Maritime Law*, 2018, at pp. 287-289.

protection services" in the context of salvage, the two different in nature but closely associated services are conspicuously separated, leaving no room for confusion.

Given that both services are provided by salvors in the same operation, their separation may attract difficulties with assessment of the respective payments. Indeed, measures taken by salvors frequently serve the purpose of salvage and environmental services simultaneously. Nevertheless,

the effects of salvage of property and environmental protection services, even if they flow from the same action such as refloating of a grounded ship and removal of a pollutant cargo, are separable. This is demonstrated, for example, by the practice of the IOPC Fund when dealing with salvage operations involving preventive measures.[564] A prime example is the *Portfield* case, in which the salvor claimed that "if his sole purpose has been to salve the tanker, without considering the risk of causing further pollution, he could have chosen a method which would be both quicker and cheaper". The IOPC Fund decided the operations had a dual purpose and apportioned two-thirds of the costs towards preventive measures, which was admissible by the Fund, and one-third towards salvage.[565] It is submitted that while environmental services provided by salvors are incidental to saving of ship and property, it does not mean that those services are salvage *per se.* Most importantly, the two kinds of services have already been treated and even quantified independently in practice for a long time by the IOPC Fund.

8.5. Concluding Remarks

In line with public policy, salvors are generously rewarded for salving maritime property, but they claim that the liberal stance has not extended to environmental protection services provided by salvors. Their position is that they are merely reimbursed for expenses incurred to encourage them to provide such services under the existing legal framework. This leads to the probe into what exactly is meant by the dubious expression "environmental salvage". It is submitted that the term is a misnomer and a name-change to "environmental protection services" is proposed instead which reflects more accurately the nature of the environmental dimension of activities carried out by salvors in the event of a ship-source pollution casualty.

Salvors' proposal for a separate "environmental award" supposedly treats environmental protection services as separate from salvage of property. However, the rationale for their proposal points to their contention that remuneration for

[564] For explanation of preventive measures, see section 3.2.1 of this thesis.

[565] "Incidents Involving the IOPC Fund: Admissibility of Claims Relating to Salvage Operations and Similar Activities", FUND/EXC.44/14, 9 October 1995, at para. 2.5.

environmental protection services, including special compensation and SCOPIC remuneration, are inadequate, thus posing a major hurdle for them to continue providing those services. It is plainly apparent that views regarding the adequacy of remuneration of salvors for providing environmental protection services are polarized and the issue remains unresolved. Any conclusion on that matter requires economic analysis which is beyond the scope of this research endeavour. There is no intention on the part of this author to align with any camp but it is observed that the salvage industry continues to be dissatisfied with the *status quo*. Whether or not the salvors' efforts will eventually succeed remains to be seen but what is of paramount importance is that the interest of the maritime community as a whole should be served by whatever happens in the end.

That said, it is recognized that regardless of whatever law reform is proposed by salvors, the key to achieving it, is predicated on the support of the insurance industry who finally bear the financial burden. In the context of environmental protection services, it is mainly the P&I clubs as the liability insurers for shipowners who ostensibly have the final say. It appears that they are firm in their resolve that the *status quo* be maintained. This is discussed in the next chapter.

9. Indemnification of Charges Incurred for Environmental Protection Services

> "Any attempt to induce salvors in such occasions to render salvage and environmental services will inevitably encounter the difficulty that the basic liability for environmental damage to be overcome was that borne by shipowners and their P&I clubs, and cargo-owners and their insurers were naturally resistant to proposals to increase the liabilities of all salvees."
>
> (Francis D. Rose, *Kennedy & Rose: Law of Salvage*, Ninth Edition, London: Sweet & Maxwell, Thompson Reuters, 2017, p. 179 paragraph 6-002)

9.1. Preliminary Remarks

The law of marine insurance is at least as antiquated in history and origin as the law of salvage. In the present times, it is the marine insurance industry which usually has the final say in law reform pertaining to most private law subject matters because it is the mechanism through which risks are covered and losses indemnified. Salvage law is no exception. To effectuate law reform in salvage, it is necessary to obtain the support of the insurance industry which provides the "last mantle" in functional and pecuniary terms. Maritime trade and commerce have entered the new millennium amidst global economic ebbs and tides and profound technological changes, and in the domain of shipping law and practice, marine insurance has assumed an expanded role. In terms of salvage, the role of marine insurance pertains primarily to services rendered by salvors in respect of salving of property, namely, ship and cargo; but in the present chapter the focus is particularly on environmental protection services carried out in the course of salvage operations.

This chapter provides a synoptic overview of marine insurance, the aim being to probe generally into the financial distribution of insurance undertakings between

property underwriters and liability insurers, particularly into the contemporary issue of environmental protection services provided by salvors. Recognizing that there is ample and excellent literature available on the general law of marine insurance, no attempt is made to delve deep into the subject of marine insurance; at any rate, no more than is deemed necessary for the elaboration of the role of marine insurance in the context of environmental protection services provided by salvors which is the thrust of the inquiry here.

It is needless to emphasize that English law predominates the world of marine insurance and reference to the Marine Insurance Act 1906[566] (hereafter referred to as "MIA") and English case law is virtually unavoidable. Thus, the law and practice of marine insurance covered in this chapter largely pertains to English law which, prior to 1906 was entirely based on the case law. Two points are to be noted at the outset in this regard; one being that the Marine Insurance Act 1906 is acknowledged as being largely a codification of the previous case law.[567] Even though some content has been revised by the new Insurance Act 2015[568], the relevant law in the context of salvage remains the same. The other point is that the English marine insurance law as it exists today is a combination of statute law and case law, and the Marine Insurance Act 1906 is indubitably hailed as the core of the law in common law jurisdictions. Indeed, the principles entrenched in the English law of marine insurance are widely accepted and applicable throughout the world, one reason being that the marine insurance industry is largely based in the city of London.

An initial point of observation is that quite understandably, there is no mention of environmental implications of salvage whatsoever in the MIA although indemnification of salvage charges and general average losses and expenditures are addressed in the legislation. Given that salvage proper, that is, saving of maritime property, is invariably intertwined with the phenomenon of environmental protection services, it is deemed necessary and expedient to first look at marine insurance implications from the vantage point of salvage for starters. In that vein, the discussion initially dwells on the issue of salvage charges paid by ship and cargo owners. This immediately begs the question as to what exactly are "salvage charges", which is discussed in detail below. As an extension of it, a follow-up question is whether payments made to salvors by the assured ship or cargo owner for environmental protection services, are indemnifiable as "salvage charges" in view of the fact that the two are intertwined. If not, what are the current arrangements in the insurance regime regarding payment for those services provided

[566] 8 Edw. 7 c. 41.

[567] F.D. Rose, *Marine Insurance: Law and Practice*, 2nd Edition, London: Informa, 2012 (hereunder referred to as "Rose"), at p. 2, paragraphs 1.5 and 1.6, p. 416, paragraph 20.14; Howard Bennett, "Reflections on a Centenary" (2006) *LMCLQ* 458.

[568] Eliz II 2015 c.4

by salvors. Following the above-mentioned discussion, the divided views of property underwriters and liability insurers towards any law reform are presented pointing to the practicality of maintaining the *status quo* or amending the existing law.

9.2. Salvage Charges and Charges for Environmental Protection Services as Marine Risks

The insurer is only liable to indemnify for losses or damage caused by the insured risks or perils. The terms "peril" and "risk" are used interchangeably in marine insurance policies to depict and describe the hazards or losses to which a maritime venture may be exposed; notably, the former is used traditionally while the latter is the preferred term in modern usage.[569] Insured risks are generally characterised by division into two groups, namely, the marine risks against physical loss, *i.e.,* loss to hulls, cargo and freight, and associated losses and risks such as war and strikes identified by clauses bearing those descriptions.[570] While the latter is precise and self-explanatory, the former is an all-encompassing term which extends to all risks traditionally relating to what was previously known as ship and goods insurance. The designation "S.G." was the abbreviation used for the expression "ship and goods", the "ship" aspect comprising hull and machinery insurance, and "goods" covering what is commonly referred to as cargo insurance taken out by the shipowner or charterer.[571] The Lloyd's S.G. policy was previously appended to the MIA 1906 as its First Schedule. It has now been replaced by the Lloyd's MAR (short form of "marine") policy. The term "marine losses" is defined as "losses incident to marine adventure" in the definition of "marine insurance' in section 1 of MIA. Correspondingly, section 3(2)(a) of the Act provides that there is a marine adventure when "[A]ny ship, goods or other movables are exposed to maritime perils". There is an expansive definition of "maritime peril" ingrained in subsection (2) in the context of that provision.[572]

---

[569] *Marina Offshore Pte Ltd* v. *China Insurance Co (Singapore) Pte Ltd* (*The Marina Iris*) [2006] SGCA 28; [2007] 1 Lloyd's Rep. 66, at p. 41 cited in Rose, at p. 289 in footnote 4.

[570] Rose, at p. 289, paragraph 13.2. See the cross reference made to chapters 14-15 and chapter17 in footnotes 6 and 7 respectively at that page. See also Susan Hodges*, Law of Marine Insurance*, London: Cavendish Publishing Ltd., 1996 at p. 173.

[571] See Donald O'May and Julian Hill, *Marine Insurance Law and Policy*, London: Sweet & Maxwell, 1993 at p. 8 in footnote 21 at that page. See also Rose, at pp.119-120, paragraph 6.23, particularly, footnote 38 at p.119.

[572] It reads - "maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures,

It is an important observation that marine risks essentially arise out of fortuitous circumstances. Be that as it may, like in general average, voluntariness is an attribute of salvage. It is a hallmark and an essential ingredient of traditional salvage law that the salvor must act voluntarily, whether it is for saving property or for saving or protecting the marine environment. This is remarkably different from other types of marine risks.

In the case of general average, voluntariness alludes to the assured making a sacrifice or incurring an expenditure, or contributing towards a sacrifice made by another co-adventurer voluntarily. In such cases, the assured is entitled to be indemnified. Salvage law in combination with the law of marine insurance is somewhat unique in this respect given that the assured shipowner or cargo owner seeks to be indemnified for the pecuniary obligation he discharges in respect of a voluntary act not committed by himself but rather by the salvor for saving his property, or saving him from pollution liability. The pecuniary obligation thrust upon him by contract or by operation of law which he must discharge, is referred to as "salvage charge" in section 65(2) of MIA. It is the underlying rationale for salvage being characterized as a marine risk.[573]

An observation that must immediately come to light from the above definition is that salvage charges are inextricably intertwined with particular charges or general average loss depending on the circumstances, for the purposes of recovery. That, in turn, dictates the extent to which the assured may be indemnified by the insurer for incurring such charges where the services rendered by the salvor were environmental protection services albeit in the course of salving property. In the text below, the object is to examine how the notion of salvage charges is treated within the purview of MIA.

At this juncture, it is perhaps useful to note that salvage charges may possibly be considered for reimbursement under protection and indemnity (P&I) cover which is based on the concept of non-profit mutuality and is different from market insurance which is profit based. It is said that "[t]he essence of P&I Clubs is that they are mostly mutual associations, where the members are both insured and insurers, contributing to claims via so-called 'calls'".[574] In the past, on occasions when market insurers, namely, hull and cargo underwriters refused to provide cover for certain risks or made it difficult for shipowners to obtain such insurance, cover was

---

restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

[573] The whole of section 65(2) including the definition of "salvage charges" is analyzed comprehensively later in this chapter.

[574] For a comprehensive understanding of this concept see Steven J. Hazelwood, David Semark, *P & I Clubs Law and Practice*, Fourth Edition, London: Lloyd's List, 2010, in particular, paragraph 1.1.

provided through P&I insurance.[575] It has been the case since a long time that varieties of third party liability, such as liability for life salvage[576] and work-related personal injuries[577] have been and still are, covered by P&I insurance. It has been said that "whereas a shipowner's hull and machinery insurance is designed primarily to protect the assured against losses to his vessel, the protection and indemnity insurance offered by P&I Clubs indemnifies an owner in respect of the discharge of legal liabilities he has incurred in operating his vessel".[578]

Given that charges for environmental protection services provided by salvors comprise a liability on the part of the assured shipowner towards salvors for services rendered, it is a sound proposition that those charges are a variety of third-party liability of the shipowner which should be indemnified through P&I insurance. It is to be noted that the statute law manifested through MIA contains legal principles that cover hull and machinery (H&M) and cargo, collectively referred to as "property", as well as P&I insurance.

9.3. Indemnification of Salvage Charges

9.3.1. Indemnification of Salvage Charges Pre-MIA

Since before the advent of MIA, it was already established that the assured's right to be indemnified for losses caused by insured perils included liability to pay salvage. The MIA was "designed to codify the common law".[579]

This being so, the case law existing before that enactment is invariably relevant. The central question therefore, is whether under common law, the assured is entitled to recover for losses caused by insured perils for which he has become liable to pay salvage. The discussion inevitably extends to the question of whether salvage charges are indemnifiable under the suing and labouring clause in a marine insurance contract. The device known as "sue and labour" existed in marine insurance contracts well before the advent of the MIA and has been considered by the courts, the leading case being the House of Lords' decision in *Aitchison* v.

[575] Chorley and Giles, at p. 502.

[576] *Ibid*. at p. 430.

[577] *Ibid* at p. 153.

[578] Steven J. Hazelwood, David Semark, *P & I Clubs Law and Practice*, Fourth Edition, London: Lloyd's List, 2010, at p. 1, paragraph 1.1.

[579] Rose, at p. 416, paragraph 20.14.

Lohre.[580] Before going into an analysis of that decision, the notion of sue and labour warrants some explanation.

The position at common law has always been that in the event of any unfortunate incident at sea, the assured has the duty to use whatever means are at his disposal to protect the insured property from suffering any further loss or damage occasioned by the misfortune. The assured's servants and agents on board are under the same obligation and are required to take whatever measures may be necessary to minimize losses as if ship or cargo were uninsured.[581]

In *Kidston* v. *Empire Marine Insurance Co. Ltd.*[582] Willes J. explained sue and labour as a functional concept in the following words:

> The meaning [of the sue and labour clause] is obvious, that, if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute … because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, …[583]

The *Aitchison* v. *Lohre*, case as decided by the House of Lords, basically stands for the proposition that salvage not carried out pursuant to a salvage contract, but under principles of judge-made law, is not recoverable under the suing and labouring clause.[584] In that case, there was a suing and labouring clause in the contract but no specific provision relating to salvage charges. Lord Blackburn held in that case that "general average and salvage do not come within either the words or the object of the suing amd labouring clause".[585] In his turn Earl Cairns L.C. distinguished the two phenomena holding that sue and labour charges were payable on a *quantum meruit* basis whereas salvage, being based on the harshness of success being a prerequisite for payment, enjoys a more generous assessment in view of the public policy to encourage salvage.[586] This aspect of the *ratio decidendi* of the case, *i.e,* the dictum of Earl Cairns L.C., has been criticized by Professor Rose who notes that his

---

[580] [1879] 4 App. Cas 755 (HL).

[581] W.D. Winter, *Marine Insurance*, 3rd. Ed., New York, 1952 at p. 195. See also Gotthard Gauci, "The Obligation to Sue and Labour in the Law of Marine Insurance – Time to Amend the Statutory Provisions", *The International Journal of Shipping Law, Part 1*, March 2000 at p.3.

[582] (1866), LR 1 CP 535.

[583] *Ibid*. at p. 543.

[584] See Rose, at p. 412, para. 20.3 particularly, footnote 10 at that page, where the author refers to "common law salvage".

[585] [1879] 4 App. Cas 755 (HL) at p. 764.

[586] *Ibid*. at pp.766-767.

statement referring to the *quantum meruit* principle is equivocal; in that the statement "… could be concerned with quantification as much as with the principle of liability".[587]

Lord Blackburn stated in his decision that the owners of the salving vesssel *Texas* which towed the assured's vessel to safety did not act as agents of the shipowners; they were simply volunteers acting as salvors under maritime law, and not pursuant to contract. They were clearly not the assured's "factors, servants or assigns" and fell outside the scope of the sue and labour clause.[588] In essence, he stated that the salvor is entitled to salvage under maritime law but the shipowner or cargo owner as the assured is not entitled to be indemnified for those expenses unless there is a salvage contract in place. He also made reference to the then extant version of *Arnould's Law of Marine Insurance and Average* in which it was stated that salvage charges are recoverable under an express clause in the policy referred to as the "sue and labour" clause.[589] The Court of Appeal had evidently agreed with that statement but His learned Lordship was skeptical of its legal validity and remarked obtusely that no authority was cited for that proposition. What Lord Blackburn held was that there could be no recovery for salvage expenses incurred by the assured if the salvage was undertaken pursuant to customary or traditional salvage principles.

In the Sixth Edition of Arnould's published subsequent to the decision of the House of Lords, there was vehement criticism of it by the Editor.[590] Notably, *Kidston* v. *Empire Marine Insurance Co. Ltd.,*[591] was the only decided case up to that time in which there was recovery under the sue and labour clause for services provided voluntarily by agents of the assured. Lord Blackburn remarked that Willes J., in that case had not made any mention of that clause being used in the context of salvage charges.[592]

In this author's view, regardless of whether or not the salvage services are offered on a voluntary basis or subject to a contract, the crucial issue is one of maritime safety. Acceptance of salvage services is at the discretion of the ship's master which must be predicated on what in his professional judgement is in the best interests of safety of the ship, cargo and persons on board. The shipowner, therefore, through the instrumentality of the master as his agent has a role to play, and any suggestion

---

[587] Rose, at p. 421, footnote 80 at that page.

[588] See *ibid*. at p. 765.

[589] [1879] 4 App. Cas 755 (HL) at p. 764.

[590] Machlachlan (Ed), *Arnould's* Sixth Edition, at p. 793 and Appendix to Chapter 2, Part 3. In chapter 25 footnote 32 of *Arnould's* Sixteenth Edition, it is stated that in the Sixth Edition of *Arnould's*, Maclachlan had made a "scathing criticism" of the decision.

[591] (1866), LR 1 CP 535.

[592] [1879] 4 App. Cas 755 (HL) at p. 766.

that the shipowner as assured does nothing for preserving the ship in the instance of voluntary salvage is manifestly erroneous. At any rate, there is little if any justification at all for the proposition that salvage services provided voluntarily without a contract, should not be recoverable pursuant to the sue and labour clause.

A remarkably notable case was *Dent* v. *Smith*[593] which predated *Aitchison* v. *Lohre*. In that case, a cargo of gold was discharged from a ship after it became a casualty and delivered to the Consul General of Russia in Turkey. The vessel was salved, not under a salvage contract but rather pursuant to the customary maritime law.[594] The assured made payments to recover the cargo which in essence was a salvage expense incurred by him. The court ruled that the payment constituted a loss caused by an insured peril and was recoverable under the insurance policy. Notably, in this case, the fact that the salvage operation was conducted pursuant to traditional salvage principles and not under a contract, did not preclude the assured from being indemnified. The outcome of the case was conspicuously different from what the House of Lords decided a decade down the road.

9.3.2. Indemnification of Salvage Charges under MIA

The *Aitchison* v. *Lohre* decision demonstrated that the law at the time treated salvage carried out under contract and under traditional salvage law differently. Where salvage services are rendered under a contractual arrangement, the assured shipowner can recover salvage charges pursuant to the suing and labouring clause in the policy under the phraseology "factor, servant or assign". But there is no such recovery where the services are provided under the principles of traditional salvage law because of the absence of privity of contract between the volunteer salvor and the insurer. Arguably, however, there might be recovery if a voluntary salvor is considered to be an agent of necessity, but as one author has pointed out, there is no general recognition of that concept in English law as there is in the civil law jurisdictions.[595]

Given the generally prevailing view that *Aitchison* v. *Lohre,* has been codified by section 65 of MIA,[596] a detailed examination of that section is warranted particularly because it addresses the question of salvage charges. At the outset, it is incumbent on the present author to expess her view that rather than section 65 codifying *Aitchison* v. *Lohre*, it purports to provide that salvage charges incurred by the

[593] (1869), LR 4 Q.B. 414.

[594] Rose, at p. 221, footnote 41.

[595] Robert Merkin, *Annotated Marine Insurance Legislation*, London: Lloyd's of London Press, 1997, at p. 57.

[596] Rose, at para 20.14.

assured under traditional non-contractual salvage are indemnifiable, but subject to any conditions expressly stated in the policy. Indeed, it is in section 78 that the decision in *Aitchison* v. *Lohre* is reflected and section 65 fills the lacuna left unaddressed by that decision. Be that as it may, an analytical appreciation of section 65 is warranted. There are two sub-sections, the first of which is a statement of law, and the second, a definition and an explanation of "salvage charges". They are as follows:

> (1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by these perils.
>
> (2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

With respect to subsection (1) it must be noted that the salvage charges themselves are treated as a loss resulting from the peril which gave rise to the charges. This subsection simply provides that salvage charges are recoverable albeit subject to "any express provision in the policy" as mentioned in the preceding discussion. Such express provisions may be extracted from the Institute Clauses in which there are clauses typically addressing, *inter alia*, salvage charges as well as exclusions with respect to cover.[597] The sub-section also provides that the charges in question must have been incurred for preventing a loss; and the loss must be one that resulted from an insured peril. Thus the recoverability of salvage charges by the assured is subject to three finite conditions. That the salvage charges must be associated with an insured peril was held in *Ballantyne* v. *Mackinnon*,[598] a case that was decided some years before MIA came into existence. Subsection (1) of section 65 thus represents a codification of the decision in that case. To understand subsection (1), the defintion and explanation of salvage charges provided in subsection (2) must be perused.

There are several elements in the definition of salvage charges in subsection (2) but not all of them are relevant to the present discussion. To qualify under the definition, the charges must have been incurred in respect of salvage services provided pursuant to maritime law, in other words, under traditional salvage law; and they must be recoverable "independently of contract". Services provided pursuant to contracts are

[597] See Institute hull and freight clauses ITCH 83, clause 11; IVCH 1983, clause 9; ITCF 83, clause 11; IVCF 83, clause 9; IHC 03, clause 8. See also Institute Cargo Clauses ICC 82, clause 2; ICC 09, clause 2. See text below under subheading 11.5.2 Institute Clauses.

[598] [1896] 2 J.B. 455 (C.A.).

distinguishable in that the customary law ingredients of danger, voluntariness and success are not necessarily present. As pointed out by Professor Rose, one distinction that is germane to this discussion is that between the common law as evidenced by cases and the law pursuant to contracts.[599] Hence, the significance of the term "independently of contract" which is self-explanatory. The other distinction is between the common law and the statute law. *i.e.*, MIA.[600]

As well, the services must not have been provided by a third party "employed for hire" by the assured himself or his agent for the purpose of averting or avoiding an insured peril. The expression " [T]hey do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them… " indicates, at least by implication, that the definition of salvage charges in subsection (2) does not accommodate salvage done under contract. Thus, services provided under contract salvage do not qualify for indemnification of salvage charges. Incidentally, such expenses as are referred to in the above-noted expression in subsection (2), may be recoverable under the suing and labouring clause of a marine insurance contract. Pursuant to subsection (2), however, they are recoverable as particular charges or as a general average loss.[601]

Notably, particular average and general average are partial losses except that the former arises out of fortuity whereas the latter is a voluntary act. It is further notable that under section 64(2) of MIA, particular average does not include particular charges defined as "expenses…other than general average and salvage charges". In particular average, the loss lies where it falls.[602] Section 76(2) provides by implication that a particular average loss is recoverable under the suing and labouring clause in the policy. By contrast, a general average loss is borne by all the co-adventurers in a maritime adventure in proportion to the interest of each.

[599] Rose, at para. 20.3.

[600] Rose, at para. 20.20.

[601] It is to be noted that "particular average" is defined in section 64(1), and "general average" in section 66(1) of MIA.

[602] Rose, at para 20.8.

9.4. Indemnification of Charges under LOF

9.4.1. Salvage Charges under LOF

LOF has undergone several major changes to usher in the environmental protection services. This development eventually evolved into the SCOPIC as an optional addendum to LOF. It was designed to provide payments to salvors for their efforts in preventing or mitigating environmental damage. The central question is whether salvage payments made by the assured under LOF and SCOPIC are recoverable as "salvage charges" under section 65 of MIA. In line with the opinion of Professor Rose, the present author submits that the LOF is not a contract in terms of the ordinary principles of that phenomenon in English law but is rather in the nature of an agreement to resolve disputes arising out of a transactional relationship in a particular way. In referring to the LOF, Professor Rose opines that -

> The main purpose of this is not, as with most standard form contracts, to settle in detail the incidents of the parties' relationship, but to provide for a reference to arbitration for determination there of the amount to be paid for the service in accordance with *the principles of the maritime law of salvage* (emphasis added).[603]

Diverse views have been expressed by other authors, commentators and salvage practitioners leading to the question of whether salvage services rendered pursuant to the LOF can be considered as salvage charges under section 65(2) of the Marine Insurance Act 1906.[604] One authoritative text is highly instructive in which the dual authors in explaining the meaning of "salvage charges" in section 65(2) of the MIA as "charges recoverable under maritime law by a salvor" have stated that it is not a requirement that salvage services must be provided without a contract, but simply restates the fundamental concept that "the right to an award of salvage is independent of whether there was a contract or not".[605] Needless to say, this explanation is not only at variance with what the House of Lords held in *Aitchison* v. *Lohre* but is purposeful, sound and reasonable.

Another well-known text writer on marine insurance law explains the words "charges recoverable under maritime law by a salvor independently of contract" in section 65(2) of MIA by saying that the object of those words is not simply to limit the purport of "salvage charges" to expenses recoverable only under the traditional "maritime law", but also to make a distinction between that and "salvage performed

---

[603] Rose, at para. 20.16 at p. 417.

[604] *Ibid*.

[605] D.J. Wilson and J.H.S. Cooke, *Lowndes, R. & Rudolf G.R., The Law of General Average and the York-Antwerp Rules*, 11th Edition, London: Sweet & Maxwell, 1990, at p. 252.

pursuant to contractual arrangements". The author goes on to say that the relevant words in the subsection highlight the proposition that "only salvage awards or salvage strictly so-called, as understood in maritime law, are recoverable as "salvage charges". Furthermore, the author opines that the words "independently of contract" are superfluous. Obviously, in that author's view those words do not add to or subtract from anything because providing services voluntarily without the compulsion of contract is of the very essence of salvage. They were inserted in the legislation presumably for adding emphasis.[606]

It is submitted that the expressions "contractual arrangements" and "contractual compulsion" in that author's comments give rise to contextual ambiguity. These expressions may be construed as references to the notion of "contract salvage" which is a pre-existing obligation or where the salvor and salvee enter into a contractual relationship after the passage of danger, which is a necessary ingredient of customary salvage. In both such instances voluntariness is absent. A related observation and submission by the present author is that where salvage is performed under LOF, the service is provided by the salvor voluntarily in a situation of danger. The arrangement is an agreement rather than a binding contract in the strict sense of that term, and not under any contractual compulsion. The present author also notes the cited author's view that the words "independently of contract" in section 65(2) are superfluous and do nothing more than emphasize the point of voluntariness being a necessary ingredient of salvage under maritime law. Those words have the effect of precluding recoverability of salvage charges arising out of salvage carried out under contract, where, as repeatedly pointed out above, voluntariness as it prevails under maritime law, is absent. Thus, arguably, rather than being superfluous, those words expressly exclude contract salvage from the definition of salvage charges but not charges pertaining to salvage carried out under salvage agreements of the LOF type where the customary law ingredients of salvage are present. An added argument in support of the proposition that the phraseology is not superfluous is based on the rationale underlying section 78(2) of MIA which provides *inter alia*, that "salvage charges as defined by this Act are not recoverable under the suing and labouring clause."

The lacuna in the *Aitchison* v. *Lohre* decision has purportedly been addressed through section 65 of MIA which provides a statutory regime for such recovery which under that decision would not have been recoverable. Thus, the assured can be indemnified for such salvage charges without having to resort to any sue and labour clause. The net effect is that sections 65(2) and 78(2) of the Act are compatibly correlated. Therefore, salvage remuneration paid for services provided under LOF can be indemnified as salvage charges under section 65 with little or no

[606] Susan Hodges, *Law of Marine Insurance*, London: Cavendish Publishing Ltd., 1996 at p. 427.

difficulty as opined by Susan Hodges. The rationale provided by that author which is perfectly sound is expressed as follows:

> Lloyd's Open Form (LOF) 1995, specifically describes itself as an "agreement", rather than a contract, and, as it operates in accordance with the principles of the law maritime on a "no cure – no pay" basis, it is presumed that such an agreement would fall within the definition of "salvage charges" as contained within the Act.[607]

The LOF does not address the issue of quantum of remuneration as it is based on the principle of "no cure-no pay". The cited author rightly states that the LOF carries the essential hallmark of salvage under maritime law through the "no cure-no pay" stipulation in the agreement.[608] The present author fully supports the above rationale and is of the view that any payment made pursuant to LOF indubitably qualifies as "salvage charges recoverable under maritime law" under section 65(2) of the Act and is distinguishable from salvage payment made under contract that is characterized as contract salvage. An added element that makes the two distinctively different is that the amount of salvage remuneration is not specified in the agreement but is left to be determined by arbitration which is another significant characteristic of LOF which puts it outside the scope of contract *stricto sensu* in which certainty of consideration is an essential ingredient.

9.4.2. Charges for Environmental Protection Services under LOF

Previous discussion on "salvage charges" under MIA 1906 indicates that payments made in respect of the safety net, special compensation and SCOPIC do not qualify as "charges recoverable under maritime law by a salvor". Since environmental protection services help shipowners to avoid liability for pollution damage, the liability to indemnify charges associated with them should rest with the P&I clubs as liability insurers.

Before the finalization of LOF 1980, the shipping community realized that the new instrument would only work if agreement could be reached between property underwriters and liability insurers as to their respective liabilities for indemnification. As a result, the Funding Agreement 1980 was concluded as follows:

---

[607] *Ibid*, at p. 429.

[608] *Ibid*.

> In order that the revision of the Lloyd's Open Form can proceed as quickly as possible, the International Group of P&I Clubs for their part and the Institute of London Underwriters and Lloyd's Underwriters' Association for their part confirm the following:
>
> > (1) the Clubs, as shipowners' pollution liability Underwriters, will provide security for and bear the full cost of the "safety net" provisions in Clause1 of the new LOF for tankers laden or partly laden with a cargo of oil;
> >
> > (2) the Underwriters will continue to accept that Salvage Awards are recoverable by ship, cargo and freight under the existing forms of policies for those interests, notwithstanding that such Awards may have been enhanced to take account of measures taken to prevent the escape of oil from the Ship.
>
> The foregoing undertakings are given subject to usual policy terms and applicable deductibles and shall continue until either party gives reasonable notice to the other that there has been a material change in circumstances."[609]

It must be noted that the Funding Agreement 1980 is not a legally binding instrument, but rather a kind of "gentlemen's agreement". Also, neither salvors nor shipowners are party to the Agreement which was between the property insurers and the P&I clubs. Consequently, salvors or shipowners could not rely upon it for any claims. However, the Agreement paved the way for the institution of the safety net. The purpose of the Agreement was to put in place a mechanism for apportionment of insurance liability in oil pollution cases between underwriters of ships and cargo and liability insurers. In effect, it provides the financial support base for the practical implementation of the safety net device. Finance is always a major concern in any law reform exercise and it is well-known that insurers are key players in such exercises as they are the eventual providers of indemnification. Law reform in salvage is no exception. Thus, in the final incorporation of the safety net concept in LOF 1980, the insurers as envisaged funders of the proposition had to be brought in.

The same logic led to review of the Funding Agreement 1980 and emergence of the Funding Agreement 1990 at the time of finalization the Salvage Convention 1989. It provides as follows:

> The adoption by the Diplomatic Conference of the International Maritime Organization in April 1989 of the International Convention on Salvage 1989 has led all interested parties to review the terms of Lloyd's Open Form of Salvage Agreement 1980 in order to incorporate the terms of the 1989 Salvage Convention. The Funding Agreement 1980 concluded between the International Group of P and I Clubs, the

[609] See De La Rue & Anderson, at p. 546.

> Institute of London Underwriters, and Lloyd's Underwriters' Association has likewise been reviewed and it has been agreed as follows:
>
> The P and I Clubs will provide security for, and will indemnify the shipowner against any award of special compensation under Article14 of the Salvage Convention.
>
> The underwriters will accept that salvage awards made under Article 13 of the Salvage Convention are recoverable from them by ship, cargo and freight interests under the forms of policy insuring those interests notwithstanding that such awards have been determined after taking into account, inter alia, the skill and efforts of the salvor in preventing or minimizing damage to the environment in accordance with Article 13.1(b).
>
> The foregoing general agreements are made subject to the terms of the relevant policy/terms of entry, and to any applicable deductible, and shall continue until any party shall give reasonable notice to the others that there has been a material change in circumstances.[610]

At the time SCOPIC was negotiated by the industry, it was recognized that neither P&I clubs nor property insurers would ordinarily be parties to a salvage agreement. It followed that they would not be bound by, or not be in a position to enforce the terms of a new clause of this type incorporated into a salvage agreement. Industry consensus pertaining to the Funding Agreement held up well until the *Renos* case in 2018.[611] In this case, the P&I insurer attempted to recoup its payment of SCOPIC remuneration from a property underwriter. The Court of Appeal ruled that SCOPIC remuneration could be included in ascertaining whether a casualty was a constructive total loss (CTL). While this decision has clarified that point, the case raises concerns for property underwriters in that the use of LOF with SCOPIC may have a greater potential for leading to CTL claims. A practical effect of the *Renos* decision might be reluctance to use the already declining LOF.

9.5. Proposed Change by Salvors: Divided Positions of Insurers

It is expedient to investigate the attitude of insurers towards salvors' proposal for an independent environmental award to be introduced into the Salvage Convention

[610] *Ibid*. at p. 548.

[611] *Sveriges Angfartygs Assurans Forening (The Swedish Club)* v. *Connect Shipping Inc (MV Renos)*, [2018] EWCA Civ 230;[2018] 1 Lloyd's Rep 285. See case commentary on *The Renos* by D.R.Thomas, "Constructive Total Loss in Marine Insurance and Notices of Abandonment" in 24 *Journal of International Maritime Law* 2018, at pp. 270-271.

1989 on the alleged premise that the existing salvage law fails to provide adequate incentives for them to perform environmental protection services. Even though property underwriters support such proposal, they want something in return, that is, shifting the liability to pay for any enhanced award relating to salvors' environmental efforts, to liability insurers who have bluntly rejected both.

9.5.1. Position of Marine Property Underwriters (MPU)

The MPU mainly comprise ship and cargo underwriters who are insurers of property damage, namely, loss of or damage to hull and machinery of a ship and the cargo carried on board; except for salvage, general average and third-party collision liability in hull policies. Notably, hull and cargo policies do not cover third-party liabilities, however, under the existing salvage law, they provide for payment of enhancement of a salvage reward for measures taken to reduce shipowners' pollution liability and other liabilities such as the removal of bunkers, placement of booms for pollution containment, *etc*.

Both English Courts as well as LOF arbitrators have since a long time, taken into consideration potential third-party liabilities as a distinctively separate element to enhance the salvage award when assessing it. More importantly, Article 13.1(b) of the 1989 Salvage Convention requires tribunals to take account of "the skill and efforts of the salvors in preventing or minimizing damage to the environment" when determining salvage awards. MPU are of the view that the Salvage Convention 1989, which is based on the Montreal Compromise of 1981 reached by industry interests including themselves, fails to recognize the substantial changes in salvage operations that have taken place over several decades. Government interference in salvage operations have increased; so, have civil and criminal liabilities of both salvors and shipowners. These in combination with technical difficulties in salvage operations have resulted in salvage rewards going up considerably. Consequently, the financial burden on property insurers has increased correspondingly. Environmental protection services provided by salvors benefit liability insurers as well as governments. They should therefore bear the costs. In all fairness, any increase in the cost of salvage should be borne by the assured or those who require salvage to be carried out.[612]

MPU intend to instigate revision of the LOF or the Salvage Convention, 1989 or even both. The purpose would be to seek a re-apportionment of their liability position in respect of an enhanced award under Article 13 of the Salvage Convention. Under any new system, measures for mitigation of losses should be borne by marine property underwriters and losses borne by P&I insurers or

[612] See Nicholas Gooding, "Environmental Salvage: The Marine Property Underwriter's View"; speech given at the CMI Colloquium in Buenos Aires 2010, *CMI Yearbook* 2010: 470-477.

governments should be apportioned. In this regard, MPU have proposed three types of awards with respect to a salvage operation, namely,

> (a) A marine property salvage award to be assessed by reference to the traditional Article 13 parameters except:
>
> > (i) "the skill and efforts of the salvors in preventing or minimizing damage to the environment" in Article 13(1)(b) of the Salvage Convention, 1989;
> >
> > (ii) the extent of environmental liabilities to third parties avoided by the shipowners; and
>
> (b) An environmental liability salvage award in respect of work done to avert or minimize environmental liabilities, that is, pollution by oil, HNS and wreck removal, and the losses to the shipowner which such liabilities might give rise to, which would include items (a)(i)-(ii) above; or
>
> (c) SCOPIC or Article 14 amounts (payable only insofar as it exceeds (a) and (b) above).

It is envisaged that (b) and (c) are alternatives and it would be for the salvor to choose which secondary award mechanism should be incorporated by notice in writing to the shipowners.[613]

MPU recognize the difficulties that will be faced in the quantification of the "environmental liability salvage award" and propose further that it should be calculated by:

> (a) costing all steps taken in whole or in part aimed at minimizing environmental liabilities to third parties under the current SCOPIC tariff.
>
> (b) apportioning (where necessary) the extent to which each step is directly and indirectly aimed at saving the property and minimizing environmental liabilities. It is suggested that measures taken which are aimed both directly and indirectly at reduction of environmental liabilities should be considered for this purpose. Steps adjudged to have been taken (following the apportionment) for the preservation of property should continue to be remunerated under the existing Art 13/SCOPIC system. Steps which are solely designed to avoid or minimize damage to the environment should be the subject of the environmental liability award alone, and steps which are designed both to preserve ship and cargo and preserve the environment should be apportioned between ship and cargo.

[613] Nicholas Gooding, "Environmental Salvage: The Marine Property Underwriter's View"; speech given at the CMI Colloquium in Buenos Aires 2010, *CMI Yearbook* 2010: 473-474.

Steps (a) and (b) above would initially be at the SCR's discretion (but with a right of appeal to the Court or arbitrator).

> (c) arriving at a "cost" for the environmental liability award and then uplifting the environmental liability award by a factor calculated by reference to the degree of risk that the liability would crystallize and the extent of potential environmental liabilities averted or minimized. Clearly this factor is not one which an SCR can reasonably be asked to determine. It would have to be determined by an arbitrator in the absence of agreement. The upper and lower limit of the uplift will have to be the subject of negotiations, but a minimum could be 25% (as for SCOPIC) and a maximum might be 100% (as in Art. 14 exceptional circumstances) subject to the cap or overall limit.[614]

Furthermore, MPU put forward proposals regarding limit for environmental salvage award, security, evidence, representation, payment, training and investment, implementation.[615]

In summary, MPU support an independent reward to be given to salvors providing environmental protection services through a review of the current salvage law. They propose a re-allocation of the liability to indemnify salvors' environmental efforts, in other words, it should be borne entirely by liability insurers or governments. Preventing or mitigating environmental damage would not be a factor for the enhancement of a property salvage award. The comprehensive regime presented above is to achieve that goal.

9.5.2. Position of Shipowners and Their P&I Clubs

The steadfast objectors of ISU's proposals for a separate regime for environmental protection services are the shipowners and their P&I insurers who, if they are adopted, have to bear the extra burden of paying for the environmental salvage rewards and would therefore wish to maintain the *status quo*. From the standpoint of shipowners backed up entirely by their P&I clubs, the International Chamber of Shipping (ICS) has contended that the current salvage scheme is quite satisfactory.[616] ICS claims that SCOPIC provides salvors with the certainty of a reasonable and profitable reward for preventing or minimizing damage to the

---

[614] *Ibid* at pp. 474-475.

[615] *Ibid* at pp. 475-477.

[616] See ICS Position Paper entitled "Proposal for Review of The Salvage Convention: A Position Paper By The International Chamber Of Shipping", the full text of which is available on the CMI website. http://www.comitemaritime.org/Uploads/Salvage%20Convention/Position%20Paper%20by%20ISC.pdf.

environment in cases which might otherwise not be financially attractive, *i.e.,* where prospects for success are slight. In response to MPU's proposition, ICS asserts that the present arrangements reflect the principle that all parties to the venture are responsible for the environment; no re-apportionment of MPU's liability under Article 13 for an enhanced award for services in respect of protecting the environment is therefore needed. Based on a similar rationale, the Director of Legal Affairs of the ICS and the International Shipping Federation (ISF), delivered an eloquent speech at the CMI Buenos Aires Colloquium in 2010 to provide further explanation.[617]

In line with the ICS, the P&I clubs, through the International Group of P&I Clubs (IG), have expressed strong objection to ISU's proposal. Their spokesman, in his capacity as Chairman of the International P&I Club Salvage Committee has described such proposal as "the supposed environmental altruism of the ISU" to obtain an additional revenue stream which they cannot justify, and has asserted that nobody will be able to demonstrate "a clear and well-documented compelling need" to amend the Convention.[618]

The IG already opposed the ISU proposal for a stand-alone environmental award at the CMI Buenos Aires Colloquium in 2010, and expressed the view that it was a revival of "liability salvage", which was a retrogressive and backward step given that it had been rejected in the past. It would inevitably lead to delays in payment, uncertainty and inconsistency in awards and increase legal costs, all of which difficulties have been well-resolved by SCOPIC.[619] In reference to the specific proposal to revise Article 13 of the Salvage Convention, 1989 deleting 13.1(b) and introducing a new 13(4) one commentator speaking on behalf of the Group is of the opinion that the change, if it materialized, "would have the effect of removing any element of sharing in the protection of the environment as between property and liability underwriters".[620] Regarding the proposed revision of Article 14, the same commentator expressed the view that the it is "an attempt to once again revive the

---

[617] Kiran Khosla, "Salvage Law—Is it Working? Does it Protect the Environment?", speech delivered at the CMI Colloquium in Buenos Aires 2010. See *CMI Yearbook* 2010: 478-487.

[618] Charles Hume, "CMI Review Of The Salvage Convention 1989 - Environmental Salvage", speech delivered at meetings of the US and Canadian Maritime Law Associations and the Maritime Law Association of Australia and New Zealand held in Hawaii in December 2011, available at the CMI website, http://www.comitemaritime.org/Uploads/Salvage%20Convention/Charles%20Hume%20paper%20-%20CMI%20Review%20of%20the%20Salvage%20Convention.pdf.

[619] Hugh Hurst, "Amending The Salvage Convention 1989 – The International Group Of P&I Clubs' View", speech delivered at the CMI Colloquium held in Buenos Aires, 2010; see *CMI Yearbook* 2010: 499-510. See also Colin de la Rue & Charles B. Anderson, "Environmental Salvage - Plus ca change . . .?", (2012) 18 *Journal of International Maritime Law* 279.

[620] *Ibid.* at p. 507.

concept of liability salvage" which, as he pointed out, had been rejected twice because of problems associated with it.[621]

The IG, is apparently of the opinion, *inter alia*, that the criteria in Article 13.1 of the Salvage Convention, 1989 for the determination a salvage award, including the provision for its enhancement is "entirely equitable." Regarding Article 14 as it stands, it is noted that SCOPIC has been created as an alternative to Article 14 may be invoked at will, which salvors will normally do, although not in all instances given that contrary to it, special compensation under Article 14 can be uplifted up to 100% of the expenses of the salvor.[622] In sum, the view of the Group is that current salvage law including Article 14 and SCOPIC if applicable "is operating successfully, ensuring a viable and profitable salvage industry and protecting the environment", which needless to say, is quite the opposite of what the salvage industry thinks, rightly or wrongly.

Most importantly, in practical terms, P&I insurers claim that it is difficult to quantify the proposed independent award for environmental protection services provided by salvors. The assessment of such award is left entirely to the discretion of insurance arbitrators. Even though they are accustomed to assessing pollution damage based on actual claims brought by real plaintiffs, they would find calculation of such award difficult, if not impossible, because it would be based on the pollution damage averted. If the pollution has not taken place, quantification of damage would be speculative leading to financial uncertainty for liability insurers and complexity for arbitrators.[623]

Apart from the above, different P&I clubs have made their voices heard as well. For example, Gard has stated on its website that the tried and tested *status quo* is preferable to the introduction of environmental salvage, regardless of how appealing it may sound.[624] The Skuld Club has adopted a similar disposition.[625]

---

[621] *Ibid*. at p.508.

[622] *Ibid*. at p. 505.

[623] Report of the IWG on Review of the Salvage Convention, 1989 – Annex 9 in *CMI Yearbook*, 2011-12 at p. 243.

[624] See "Environmental salvage - It sounds good but is it?"; full text available at the Gard website, http://www.gard.no/web/updates/content/20651771/environmental-salvage-it-sounds-good-but-is-it.

[625] Colin De La Rue & Charles B. Anderson, "Environmental Salvage - Plus ca change . . .?", (2012) 18 *Journal of International Maritime Law* 279.

9.6. Concluding Remarks

One of the underlying reasons for success in the 1980s in reviewing the LOF and the Salvage Convention 1910 to introduce environmental protection services into salvage law was support from the insurance industry. At the time of drafting LOF 1980, the concept of liability salvage was proposed but firmly rejected by the P&I clubs who then created the "safety net" which became a prime feature of LOF 1980. At the drafting stage of the Salvage Convention 1989, a similar situation prevailed. Further to vehement objections expressed by the insurance industry, the special compensation regime was developed within the Convention. Unsurprisingly, SCOPIC turned out to be a popular device because of the back-up from the insurance market evidenced by the Codes of Practices as mentioned above.

P&I Clubs as liability insurers are the ones, who in the final analysis, must undertake the ultimate financial burden; and therefore, in effect have the final say in the matter of whether any law reform in respect of environmental protection services provided by salvors. So far, they have strongly supported maintaining the *status quo* comprising the Salvage Convention 1989 and SCOPIC. It is highly unlikely that in the foreseeable future they will abandon the certainty of SCOPIC and agree to an uncertain and discretionary "environmental award" as proposed by salvors whether it is done through convention or contractual arrangements. Any breakthrough in addressing salvors' dissatisfaction regarding the current salvage regime through remuneration for environmental protection services seems impossible. The international maritime community must be presented with an alternative that can serve as a compromise between the two extreme positions currently in existence on this seemingly irreconcilable issue. This author purports to address it through a proposition that may be instrumental in bringing the stalemate to a satisfactory conclusion from a perspective other than through remuneration.

Part IV
- Salvors' Liability and Immunity

10. Liability for Salvorial Negligence

> "Dr. Lushington's admonition that, 'we must look at things done on the sea with a very different eye to those which are done on the land' seems to have been almost wholly deprived of effect with the passage of time."
>
> (D. Rhidian Thomas, "Salvorial Negligence and its Consequences", [1977] 2 *LMCLQ* 167 at p. 172)

10.1. Introductory Remarks

Against the background of the dissatisfaction of the salvage community with the *status quo* and its failure to persuade the international maritime community to engage in further law reform through amendment of the Salvage Convention, the purpose of this chapter is to closely examine the question of liability of salvors for negligence in the performance of their tasks. Discussion of salvorial negligence will flow into and interlink with the subject of responder immunity for salvors in the next chapter. Close and detailed examination of the latter subject can assist in determining whether it can be held out as a compromise solution to the opposing postures adopted by the salvage industry and the rest of the maritime community centering on the introduction of an autonomous regime for provision of environmental protection services by salvors. In fulfilment of this aim, this chapter dwells on the issue of liability of salvors for failure or negligence in the performance of their services.

At the outset, it must be appreciated that the liability of a salvor may not always emanate from negligent conduct as a tort incidental to his services. It is well known that in the modern realm of salvage where most salvage operations are conducted on the basis of a contractual instrument such as the LOF, liability may arise from a breach of contract in addition to, or separate from tortious liability for failure to exercise due care. Furthermore, there is the question of whether and how differently should a non-professional volunteer salvor be treated. While these issues are considered chronologically and contextually as appropriate, the thrust of the discussion is on salvorial negligence in respect of professional salvors as they are

the dominant entities providing salvage as well as environmental protection services.

In order to appreciate the intricacies of the law of salvorial negligence, it is necessary to have some appreciation for the general law involving the tort of negligence in English law and then proceed to understand salvorial negligence and its consequences in the modern milieu. Whether or not such detailed analysis as is envisaged in this chapter will lead to any resolution regarding the dissatisfaction of the salvage community towards the existing salvage law, will remain to be seen until we arrive at the culmination of the research effort embodied in this thesis.

10.2. Liability for Salvorial Negligence under Common Law: Pre-*Tojo Maru*

Liability is a qualitative concept in law which points to a person's quality of conduct that is repugnant to legal norms and standards. Thus, when a person acts in a manner contrary to such norm or standard as is recognized or imposed by the law, he is said to be liable. The standard that needs to be met is not necessarily the same in all cases, and liability in tort and contract are distinguishable as legal phenomena even though in certain instances, they are interrelated.

Against this backdrop, the purpose in the following text is to delve into the notion of liability in the context of salvage, first by reference to the era when such services were rendered by seamen or fishermen as non-professionals, then stretching into the period of professional salvors coincidental with the advent of steamships replacing sailing vessels in the 19th century. The latter part of this century witnessed the growth of shipping and the associated technology. Professional salvors had specialized equipment including vessels and trained salvors placed at strategic locations. Two factors are of particular relevance to this discussion, one being the merger of admiralty with the common law through statutory enactment, and the other, the institution of the law of negligence in the common law in 1932 by the decision of the House of Lords in the celebrated case of *Donaghue* v. *Stevenson*.[626] The evolution of professional salvors entering the scene brought in the parallel development of contractual instruments into salvage operations. Meanwhile, the common law of negligence also developed in the early 20th century which brought about a combination of tort and contract into the domain of salvage.

[626] [1932] A.C. 562.

10.2.1. Liability of Salvors

It has been a custom of the sea since time immemorial that a ship at sea proceeds to the aid of another in an attempt to save it in a time of danger or distress. Indeed, under the Rhodian Sea Law, this was a recognized duty which made it compulsory under pain of penalty to act in aid of a distressed vessel together with or without cargo.[627] This act of engagement by a ship and its seamen attempting to save another ship in a fatal predicament, gave rise to the maritime concept of salvage, and the persons rendering such services were characterized as salvors. However, the act of the salvor was a voluntary mission, and contrary to the impression given in the Rhodian Sea Law, did not evolve as a duty to be discharged compulsorily on pain of penalty, thus no liability was imposed on salvors under customary salvage law. Indeed, voluntariness on the part of the salvor in the face of imminent or impending danger emerged as one of the ingredients of salvage law and practice that would justify the payment of remuneration by the salved ship. Although the undertaking was voluntary, no remuneration would be forthcoming unless it was successful.

Fast-forwarding into the present milieu of shipping, it is now a well-established truism that a salvor would be liable if he were negligent in providing salvage services. It is notable, in this vein, that the present state of affairs evolved over a considerably long period of time, at least in terms of English salvage jurisprudence. An eminent scholar referring to the court action in *The Tojo Maru*,[628] remarked that the explosion resulting from the negligent firing of a cox bolt gun into the non-gas-freed tanker "hurled learned counsel back some 130 years in a search for precedent and, almost incidentally, caused some 205,514 damage to the tanker."[629]

10.2.2. Skill and Care

In the early days, skill and care was that expected of a seaman by virtue of his calling and not that of a professional salvor as would be the case in relatively recent times and today. The salvor traditionally enjoyed an elevated position in the eyes of admiralty, quite differently from the common law. A distinguished scholar of contemporary times put it quite vividly in the following words:

---

[627] W. Ashburner, *Rhodian Sea Laws*, Oxford University Press, 1909, 2nd Edition published in 1976.

[628] [1969] 1 Lloyd's Rep 133 (first instance); [1969] All E.R., 1179 (C.A.); [1971] 1 Lloyd's Rep 341 (H.L.).

[629] F.J.J. Cadwallader, "The Salvor's Duty of Care", *Maritime Studies Management*, 1973, at p.3.

> The civilian judges were beguiled by the romantic image of salvage as a service performed within an environment of tempestuous seas, gale force winds, blinding rain and weighty risk to seafarers and property.[630]

Much was said by the stalwart admiralty judges of England as well as their counterparts on the other side of the Atlantic Ocean in the United States. The great Admiralty judge Lord Stowell referred to "...enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures".[631] Similar sentiments were expressed in the Canadian admiralty case of *The W.G. Putnam*.[632]

Doubtless, times have changed with regard to judicial attitude towards liability of salvors, but not only has this occurred over an extended period of time but various factors have entered the equation since the glorious days of the past colourfully expressed in the passages and quotations cited above and below. First, salvage services are no longer provided from passing ships, by seamen extending a helping hand to fellow-adventurers in distress at sea and so providing personal service. The English courts acknowledged this personal service as giving entitlement to salvage. In one of the indispensable texts on salvage law it is stated that "In the days of sailing ships, salvage services were generally of a personal character and salvage was commonly performed by the dispatch of men in boats to the aid of the vessel to be salved."[633] Reference is made to Dr. Lushington's diction in *The Charlotte*[634] in which he held - "In order to entitle a person to share as salvor, he must, I conceive, have been personally engaged in the service". This principle had been in vogue in the Admiralty Court for a long time, as mentioned by the illustrious judge.

Where skill and care of the salvor as mentioned above were prerequisites, would the lack thereof result in salvorial liability? Being a voluntary act, and given the stringency of the requirement of success, it would have been unthinkable that a salvor who was essentially a seaman, would be subjected to legal liability for any want of skill or care evident in his endeavor considered "so heroic that it is unrivalled in fiction".[635]

Even though "skill and care" appears conjunctively as a phrase to denote a singular concept pertaining to potential liability of the salvor, it is doubtful that want of skill

---

[630] D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 57, at p. 62.

[631] *The Clifton*, 3 Hag Ad. 117; 166 E.R. 349.

[632] (1880), Y.A. S. 271.

[633] Kennedy, at p.199.

[634] (1848), 3 Wm. Rob. 68.

[635] See *The Holder Borden*,12 Fed Cas. 331 (No. 6600) D. Mass. 1847).

could categorically translate into liability unless there was evidence of damage. It would seem that deprivation of remuneration pursuant to the requirement of success would suffice in the event of failure of the salvor to deliver on the salvee's expectations. His liability may stem from his failure to deliver the results of his services as expected by the salvee or owner of the relevant maritime property even though it is offered voluntarily, such as the expectation that the salvor will not cause or inflict any damage to the property. By contrast, want of care would almost invariably lead to liability as exercising care would be considered a duty of the salvor. The net effect, however, is that damage is the common denominator; if it is evident, then liability will lie regardless of whether it was skill or care that was in deficiency.

In *The Neptune*,[636] Dr. Lushington held that "in order to entitle salvors to a salvage award ... they must show that they possess skill commensurate with their vocation and condition in life, and adequate to the duties which they undertook to perform". Again, in a later case, *The Cape Packet,* Dr. Lushington held -

> when persons undertake to perform a salvage service, they are bound to exercise ordinary skill and ordinary prudence in the execution of the duty which they take upon themselves to perform ... they must possess and exercise such a degree of prudence and skill as persons in their condition ordinarily do possess, and may be fairly expected to display.[637]

10.2.3. Duty, Standard of Care and Negligence

Under traditional salvage law, that is, excluding salvage performed under pure contracts, salvors as volunteers have no duty to complete a salvage operation and take the property in distress to a place of safety or refuge. They are entitled to terminate the service and walk away with impunity devoid of any liability.[638] Even so, salvors do owe a duty of care when performing salvage operations, albeit expressed variously in terms of the duty to exercise skill, care and prudence. As mentioned earlier, the duty can be traced back to the Rhodian Code of ancient times.[639]

It is suggested by reference to the dicta in the above-mentioned cases that the exercise of care (or prudence) amounts to a duty in law, otherwise referred to, as a

[636] (1842), 1 W. Rob. at p. 297.

[637] (1848), 3 W. Rob. 122 at p. 125.

[638] Aleka Mandaraka-Sheppard, *Modern Maritime Law*, Vol. 2, Third Edition, 2013, Chapter 10-Risks and Liabilities under Salvage, Section 8 – Duties and Conduct of Salvors.

[639] D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 57, at pp. 57-58.

"duty of care". A breach of that duty would ostensibly amount to negligence. It clearly is the case that the salvor always owed a duty of care to the salvee irrespective of the fact that he may have been an amateur, even though the fact that such a duty exists is taken for granted and attention is simply paid to the form it takes. Furthermore, it has never been seriously contended that it does not apply to non-professional salvors, and that such a service provider can ignore his duty of care which is implicit, and yet seek salvage remuneration solely based on success.[640]

On the other hand, in the past it has been contended by some that an amateur salvor owes no duty of care. Such contention is based on the specialized characteristics of a typical "no cure-no pay" contractual arrangement given that the salvor gets nothing in the event of failure. But that argument is baseless given that in the commercial world, there are several instances of similar contracts where payment is due only if the services are fully performed. At common law, there is no exception to the duty of care requirement in such contracts.[641]

In the early years of salvage decisions rendered by the Admiralty Court, the relationships that could give rise to a duty of care and consequent actions in tort were far from being consolidated. That was not quite the case with contractual relationships, but traditional salvage, strictly speaking, was not based on contract. Furthermore, both in admiralty and at common law, there was already in place a distinction between ordinary negligence, *i.e.* negligence *simpliciter* and gross negligence or *crassa negligentia*. In terms of salvage law, a distinction was made between a breach of the duty of a salvor to exercise "ordinary skill and ordinary prudence" and his failure to exercise "the care of a skilled salvor". Dr. Lushington described the former as "gross negligence", which he held was the only duty owed by the salvor to the salvee. He differentiated this from the latter, namely, the "failure to exercise the care of a skilled salvor" and referred to it as "another kind of negligence".[642] At any rate, it appears that the distinction between the two varieties of negligence defines the standard of care required by the law for the discharge of the duty of care, and the standard of care is defined as "due care" also known as "reasonable care". The duty to exercise "best endeavours" which appears in the LOF is a similar phenomenon.[643] But in the observation of this writer, it is probably better associated with the notion of "skill and care".

---

[640] F.J.J. Cadwallader, "The Salvor's Duty of Care", *Maritime Studies Management*, 1973, at p.4.

[641] *Ibid.* See also, Lord Diplock in *The Tojo Maru*, [1971] 1 Lloyd's Rep 341 (H.L.) at p. 363.

[642] *The Cape Packet* (1848), 3 W. Rob. 122 at p. 125.

[643] See D. Rhidian Thomas, "Marine salvage and the environment: developments, problems and prospects", chapter 6 in Richard Caddell, Rhidian Thomas (Eds), *Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea - Legal*

Even though duty of care of a salvor arises in admiralty by virtue of statute or a contractual relationship, the substantive essence of the duty is no different. Indeed, the parties are free to contract to a higher standard of care than what is dictated by admiralty or statute law; however, in practice, salvors would accept that only on rare occasions.[644]

Under the existing LOF 2011, salvors bear the obligation to use their "best endeavours" to salve the property in danger and to prevent or mitigate damage to the environment while performing the salvage services.[645] Notably, the term "best endeavours" is generally used in commercial contracts; it was introduced in salvage agreements like LOF in the 19th century. As stated by Brice, it may "simply have been a shorthand way of a voluntary salvor making it clear he did not guarantee success but would do his best".[646] In a non-salvage case, *Sheffield District Railway Co.* v. *Great Central Railway Co.,*[647] "best endeavours" was interpreted literally meaning that "the contractor will do his best, not his second best".[648] In *I.B.M. United Kingdom Ltd.* v. *Rockwell Class Ltd.*[649], the Court of Appeal held that, in the context of a buyer's obligation, "best endeavours" meant that the buyer was to take all steps within his power to produce the desired results; those steps being whatever a prudent, determined and reasonable buyer acting in his own interest would take, with the desire to reach those results.[650] In *Overseas Buyers Ltd*. v. *Granadex SA,*[651] a sale of goods case, Mustill J. expressed the view that "perhaps 'best endeavours' in a statute or contract means something different from doing all that can be reasonably expected – although I cannot think what the difference might be". In any event, the test was an objective one; in other words, "best" would be what was reasonably to be expected in the circumstances.

It was only in the latter half of the 19th century that professional salvors appeared on the scene coincidental with the advent of steam-powered ships. Prior to that, as

---

Implications and Liabilities, London: Lawtext Publishing, 2013 at p. 161; see also D.R. Thomas, "The 'best endeavours' obligation of salvors", (2012) 18 *JIML* 179-181.

644 D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 60, 1976-1977, at p.58.

645 LOF 2011, Clauses A and B.

646 Brice, para.8-26.

647 [1911] 27 T.L.R. 451.

648 *Ibid*, at p. 452.

649 [1980] F.S.R. 335.

650 Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities*, Chapter 10 "Risks and Liabilities under Salvage", paragraph 8.1.1 - "Judicial Interpretation of 'Best Endeavours'".

651 [1980] 2 Lloyd's Rep. 608, at p. 613.

mentioned elsewhere in this chapter, salvage services in the form of assistance was given to vessels in danger and distress by the crew of passing ships or ships in the vicinity. These "salvors" possessed the prowess of seamen but not of professional salvors. They carried out occasional salvage operations independent of contract which justified the application of a different standard of care to them as with respect to professional salvors almost invariably operating under contract.[652]

Incidentally, the Admiralty Court had no jurisdiction to deal with a claim for damages in respect of gross negligence alleged on the part of a salvor. The breach of duty was assimilated with willful misconduct and the consequence with respect to the salvor was punitive in nature.[653] Thus, instead of compensatory damages, the remedy was forfeiture of the reward regardless of whether or not the salvage was successful.[654] With regard to negligence that was not of the gross kind, even though it was not a breach of the duty of care owed by the salvor to the salvee, it nevertheless impinged on the merit of the services; in other words, on the quantum of the reward which could be reduced. In both instances, that is gross negligence or otherwise, the remedy was a diminution or forfeiture of the salvage award but there was no provision for compensatory damages except in cases where damage was consequential to collision.[655] In both instances, Sir Robert Phillimore used the same principles as those applied in the common law courts in respect of causes of action in negligence.[656]

10.2.4. Negligence at Common Law

As stated by Kennedy, in the early years of salvage judgments rendered by the Admiralty court,[657] negligence as a cause of action was largely underdeveloped in the common law. Legal relationships requiring the discharge of a duty of care was still at an evolutionary stage other than those arising out of contract. Incidentally, salvage was not considered to be associated with contract law.[658]

---

[652] Kennedy, at pp. 199 and 201; See also Rhys Clift & Robert Gay, "The Shifting Nature of Salvage Law: A View from a Distance", 79 *Tulane Law Review* 1355, 2005, at p. 1361.

[653] *The Tojo Maru*, [1971] 1 Lloyd's Rep. 341, at p. 366.

[654] *The Atlas* (1862) 1 Lush. 518.

[655] *The Thetis* (1862) 1 L.R. 2 A. & E. 365 and *The C.S. Butler* (1874) L.R. 4 A.&E. 178.

[656] See the judgment of Lord Diplock in *The Tojo Maru*, [1971] 1 Lloyd's Rep. 341, at p.366.

[657] Maritime arbitration was non-existent at that time.

[658] Kennedy, at pp. 462-465.

It was not until the decision of the House of Lords in *Donoghue* v. *Stevenson*,[659] that the legal concept of negligence as a tort was firmly established in English law. At that time, in accordance with this decision, liability was only imposed for negligent acts committed by the defendant. In a later decision of the House, liability was extended to statement and representations made negligently.[660] In the *Donaghue* case, Lord Atkin set out the ingredients necessary for a cause of action in negligence, consisting of four elements. The plaintiff has to prove that the defendant owed him a duty of care, that he was in breach of that duty, that the plaintiff suffered damage and that the defendant's breach was the proximate cause of the plaintiff's loss or damage. This pronouncement of his Lordship was based on the so-called "neighbour principle" which embodied the notion that a person owed a duty of care to his neighbour who, in turn, was any person who would be detrimentally affected by his actions or omissions.

This principle has become the bulwark of negligence law in all common law jurisdictions and was referred to in the important case of *The Delphinula*[661] which is discussed in more detail later in this chapter. The notion of salvorial negligence as it exists today is squarely based on the doctrine of negligence as propounded in the *Donoghue* case and followed in numerous other decisions involving liability for the tort of negligence. Furthermore, it is to be observed that unlike the civil law jurisdictions of continental Europe and others, negligence in the common law is not governed by any statute but is almost solely subject to the case law.

Incidentally, a fifth parameter in the form of "reasonable foreseeability" was added to the four ingredients articulated by Lord Atkin; it came out of a decision of the Privy Council arising on appeal from the High Court of Australia. This was a maritime case known as *The Wagon Mound* (No. 2).[662]

10.2.5. Leniency and Public Policy

The Admiralty Court was merged with the English High Court of Justice pursuant to the Judicature Act of 1873 which was carried over into the consolidation of that Act in 1875.[663] Prior to 1873, the Admiralty Court of the 19th century was visibly sympathetic towards the plight of salvors and was not keen on imposing undue hardships or onerous legal obligations on them that would only serve to discourage

[659] (1932), A.C. 580.

[660] *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] A.C. 465.

[661] (1947), 80 Ll. L. Rep. 459 (C.A.); (1947), 2 All. E. R. 465.

[662] *Overseas Tankship (UK) Ltd.* v. *The Miller Steamship Co.* [1967] 1 A.C. 617.

[663] Brice, at paragraph 1-08. For an excellent account of the reform in the English judiciary together with the fusion of law and equity, see Kennedy, at pp. 51-52.

salvors from undertaking such operations that were manifestly dangerous. Certainly, there was the element of public policy at play that the court put into its consideration in dealing with salvage cases. Thus, there was a show of "latitude and scope to the operational favour of the salvor", and "the desired goal was to view the salvor with a kindly and benevolent eye and generously reward his efforts and dexterity...".[664] Undoubtedly, the Admiralty Court of the 19th century displayed a marked inclination to unhesitatingly support the cause and position of the salvor. It was said-

> For obvious reasons of public policy, salvors are looked upon with favour, and are encouraged by our maritime law, and the whole history of the subject, and the authorities attest that a clear case must be made out before salvors can be invested with liability.[665]

The American Admiralty Court in a similar vein held per Thomas J. in *The Henry Steers* -

> It would be a hurtful rule that a person willing to save an imperiled ship, and then crying to him for aid, must fear to give it lest he be mulcted in damages or go entirely unrecompensed for lack of proper skill.[666]

The English Admiralty Court tended to display leniency towards salvors for reasons of the public policy of encouraging the undertaking of salvage services by protecting salvors from excessive consequences of their negligent misconduct.

Thus, in 1955, Willmer J. held as follows in *The Alenquer; The Rene*[667]:

> It seems to me that I have to pay regard to the general principles of policy in relation to salvage which have been laid down over the years by this Court. Those general principles of policy require that this Court, in judging the conduct of salvors, should err, if anything, on the side of leniency towards salvors in so far as their behavior is criticized ... if the result of the decision of this Court were such as to discourage salvors from taking risks and showing enterprise when rendering services at sea.[668]

Similarly, in *The Tojo Maru,*[669] Lord Pearson expressed the view that "for reasons of public policy ... if a question arises as to whether salvors have been guilty of

---

[664] D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 57, at p. 58.

[665] See *The Leon Blum*, (1915), P. 90 at p. 102.

[666] 110 F. 578 at p. 582 (D.C.E.D. N.Y. 1901).

[667] [1955] 1 Lloyd's Rep 101.

[668] *Ibid* at p. 112.

[669] [1971] 1 Lloyd's Rep. 341.

negligence in the course of salvage operations, the Courts will take a lenient view."[670] Such leniency is evident in the standard of care which the courts have said is owed by salvors, the extent of negligence leading to liability for such negligence and the form it takes. Thus, it is evident that even though liability for salvorial negligence is presently on a different footing from where it was in the bygone era, English courts still give recognition to the need for leniency towards the few and far between cases where non-professional salvors are the service providers. There, a lower standard of care may be recognized but not as a complete exception to the rule that salvors can be liable for their negligence.[671]

10.2.6. Tiers of Consequences for Breach of Duty of Care

In the beginning, a failure to display the requisite skill of a salvor (who was not a professional) and discharge his duty of care, simply led to a diminution of his reward assuming he was successful in salving the maritime property in question. In a worst-case scenario, the salvor would forfeit the entire reward, but that would happen only in extreme cases of misconduct committed willfully, amounting to a criminal offence. By contrast, a simple mistake or misconduct on the part of the salvor would simply result in a reduction of the award which would be commensurate with the diminution in the value of the property so caused. In *The Atlas*, on appeal from the decision of Dr. Lushington, Sir John Coleridge in the Privy Council expounded the following proposition:

> Where success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, no misconduct short of that which is willful and may be considered criminal, and that proved beyond a reasonable doubt by the owners resisting the claim, will work an entire forfeiture of salvage. Mistake or misconduct other than criminal which diminishes the value of the property salved or occasions expense to the owners, are properly considered in the amount of compensation to be awarded.[672]

Viewed in terms of a vertical configuration, the consequences of failure to discharge the duty of care or want of requisite skill on his part, would be manifested through a reduction in the salvor's award down to the threshold of nil or zero, below which there was no provision in the law to allow entry into the domain of negativity. As

---

[670] *Ibid.* at p. 360.

[671] See D.Rhidian. Thomas, "Salvorial Negligence and its Consequences", [1977] 2 *LMCLQ* 167 at p. 168.

[672] (1842), 1 Lush. 518 at p. 528.

mentioned above, the threshold of zero could be reached in one jump by forfeiture of the entire reward only in appropriate cases such as willful misconduct.[673]

It was virtually unthinkable, other than in a few exceptional cases that the salvor would be made to pay recompense to the owner of the salved property.[674] A salvorial award was a claim for services successfully provided; not a claim in respect of any loss or damage, suffered by the salvor, and therefore, was not a remedy. By the same token, any loss or damage suffered by the salvee by reason of the salvor's want of skill and care amounted to misconduct, otherwise characterized as negligence, for which the salvee's remedy would lie in a reduction of the award payable by him or, in the case of willful misconduct or *crassa negligentia,* to a forfeiture of the whole award. Thus, what the court handed down was a kind of "civil punishment" being punitive in nature rather than being of a compensatory character in favour of the owner of salved property.[675]

The notion of damages being payable to owners of maritime property in respect of salvorial negligence is a relatively new phenomenon bringing legal responsibility to the level of liability in the bottom rung of the vertical configuration envisaged above as the last tier. Until then, reduction and forfeiture of the salvage reward were like "shields" to protect the salvor from demise or obscurity, but the imposition of liability in damages, otherwise referred to as "affirmative damages' discussed below, coupled with the right of the salvee to counterclaim against the salvor for negligence appeared as a "sword". This theme is pursued below more fervently. A contextually important observation in this regard is that prior to the merger, the Court of Admiralty had no jurisdiction over claims in tort for damage to property other than in cases involving collision.[676] Thus, no proper consideration could be given to the consequences of salvorial negligence because of the jurisdictional and procedural obstacles. But the House of Lords in *The Zeta*[677] declined to accept the view that such jurisdiction was not available.[678]

---

[673] Numerous such cases are mentioned in Kennedy, paragraph 1126 at pp. 476-477.

[674] For example, in *The Thetis* L.R. 2 A. & E. 178 a pre-Judicature Act 1873 case which involved a negligent collision incidental to a salvage operation, where the salvee vessel was a total loss, the Court entertained a compensatory right of action against the salvors.

[675] *The Magdalen* (1861), L.J. Adm. 22 at p. 24 per Dr. Lushington. See also *The Cape Packet* (1848), 3 W. Rob. 122 and *The Perla* (1857), Swab. 230. The point is admirably expressed in Kennedy, at pp. 465-466.

[676] *The Ida* (1860), Lush. 549; *The Robert Pow* (1863), Bro. & Lush.

[677] [1893] A.C, 468.

[678] See Kennedy, at p. 465 where the author remarks that "Dr. Lushington's view co-existed until 1873" with that of the House of Lords.

10.3. Liability for Salvorial Negligence under Common Law: Post-*Tojo Maru*

From leniency as a matter of public policy to liability for negligence as it stands today has not been a smooth voyage for salvors. In the past, leniency was exercised by courts in respect of salvors who were ordinary seamen or fishermen and the standard of care was commensurate with their calling that changed over time as described earlier in this chapter.

A salvor has a duty of care at common law to exercise reasonable skill and care, a breach of which will lead to liability in tort or contract as the case may be. Salvorial negligence can be broadly divided into two groups; one is negligence before the fact necessitating a salvage operation exemplified by a situation where a towing operation converts to a salvage operation because of the negligence of the tug-master; in other words, a dangerous situation is created requiring a salvage operation. In the other instance, the salvor may be acting in a negligent fashion in the course of a salvage operation.[679] In the first type, that is, where negligent conduct causes danger thus creating the need for salvage, the so-called equitable doctrine of "clean hands" would apply. In *The Cargo ex Capella*,[680] Dr. Lushington elaborated on this doctrine by expressing the principle that "no man can profit from his own wrong-doing". However, in *The Beaverhood* v. *The Kafiristan*,[681] the House of Lords overruled the decision of Dr. Lushington and reset the law by holding that where salvorial negligence caused danger and led to the need for salvage services, in the interest of public policy of encouraging salvage operations, the claimants are entitled to a reward, but negligence will be a considered factor which might reduce it to the level of zero in certain circumstances, and in others, entitle the salvee to counter-claim for damages.[682]

The second type of salvorial negligence, that is, negligence in the course of the salvage operation being performed, can give rise to three different effects or consequences. The first consideration would be the skill and care of the salvor as a direct factor in the assessment of the salvage award, and negligence leading to its reduction or even forfeiture. In the second instance, the negligent misconduct of the salvor may result in a diminution of the salved value of the property, that is, the

---

[679] See D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 57, at p. 64.

[680] (1867), L.R. 1 A. & E. 356 at p. 357.

[681] [1938] A.C. 136.

[682] Kennedy, at pp. 461-462.

salvage fund. Thirdly, salvorial negligence may result in liability of the salvor to pay damages.[683]

Given the three instances mentioned above, there is the risk that the salvor may be penalized three times over.[684] In the words of Kennedy, "Whilst proper regard must be had to the interests of the victim of the salvors' negligence, care must be exercised to avoid injustice to the latter by prejudicing him two or three times over" on the same grounds.[685]

In a number of cases following the merger of the common law and admiralty jurisdiction, salvors were held liable to pay damages;[686] and in some others, remarkable as ground-setting precedents, counterclaims against salvors for negligence were advanced by owners of salved property and accepted by the courts.[687] In *The Dwina,*[688] Sir Charles Butt held that in the course of rendering salvage services if the salvor was found to be negligent, the negligence did not have to be gross in character to render him liable to the salved vessel. Most importantly, a complete reversal of the pre-1873 Admiralty Court position emerged in the decision of the Court of Appeal in *Anglo-Saxon Petroleum Co. Ltd. and Another* v. *The Admiralty* (*The Delphinula*).[689] This was the case which robustly rejected all previous propositions nurtured in Admiralty that salvors were privileged over and above ordinary service providers in terms of their standard of care, and could not be subjected to a counterclaim or independent action for damages resulting from salvorial negligence. The dictum of Atkinson J. in the trial court upheld by the Court of Appeal was as follows:

> I do not think any different law applies to people undertaking salvage operations from the law which applies to those rendering any other sort of services. They have to exhibit the skill and care which can be reasonably expected from persons in their position.[690]

Needless to say, the pronouncement was centred on the question of whether liability for salvorial negligence should be considered "below the threshold", that is, further

---

[683] Kennedy, at p. 472.

[684] Brice, para. 7-05.

[685] Kennedy, at p. 472.

[686] *The C.S. Butler; The Baltic* (1874), L.R. 4 A. & E. 178; *The Yan Yean* (1883), L.R. 147.

[687] *The Dwina,* [1892] P. 58; *The Lowmoor* (1921), 6 Ll.L.R. 63; *The Queenforth* (1923), 17 Ll.L.R. 204.

[688] [1892] P. 58 at p. 61.

[689] (1947), 80 Ll. L.R. 459 (C.A.).

[690] [1946] 79 Ll.L.R. 611 at p. 634.

downwards from reduction of the award and forfeiture of it entirely so as to accommodate a counterclaim or separate action.

In this case, the facts of which took place in 1943 in the middle of World War II, the oil tanker *Delphinula* grounded near the entrance to Alexandria harbour in Egypt. The owners engaged the services of the local admiralty salvage department to salvage the vessel which could be done by towing the vessel off with cargo on board, or discharge the cargo into lighters and then tow the vessel under its own power or in tow to dry dock for repairs or to jettison the cargo by discharging it into the sea. The head of the salvage department at the port which was under the complete control of the Royal Navy given the war time situation, adopted the last method. The cargo was pumped out into the sea through the bottom which had become holed. The cargo got fire and eventually the ship was lost, but some cargo was saved. The owners brought an action against the Admiralty as would-be salvors, framed in negligence.

The dictum of Atkinson J. at trial has been referred to above stating that the law applicable to salvors in terms of skill and care was no different from that which applied to other kinds of service providers. The Court of Appeal unhesitatingly agreed with the view of Sir Charles Butt in *The Dwina*[691] as correctly representing the applicable legal principle in question. This holding of the court was more severe than any other previously rendered decision in relation to the liability of the salvor confirming that there was no difference in principle between the admiralty law and common law. In other words, the Court of Appeal held that the general principles of duty of care and liability for negligence propounded in *Donoghue* v. *Stevenson*,[692] including the "neighbour principle", was equally applicable to salvors. The Court of Appeal held as follows –

> We can see nothing in the law of maritime salvage as known in our courts of Admiralty to take the salvor out of the general category of persons to whom the common law principles applies.[693]

As remarked by one author, the *Delphinula* decision "marks the initial point where the notion of negligence in maritime law was ...understood to be consistent with its conventional understanding under the general common law assessment of liability".[694]

---

[691] [1892] P. 58.

[692] (1932), A.C. 580.

[693] *The Delphinula* (1947), 2 All. E.R. 479, at p. 479.

[694] Miso Mudric, *The Professional Salvor's Liability in the Law of Negligence and the Doctrine of Affirmative Damages*, LIT Verlag, 2013, at para. 5-84 at p. 198.

At the level below the threshold of zero, the notion of liability for salvorial negligence arises through two alternative strands; one being the independent cause of action which was hitherto unknown except in *The C.S. Butler*, *The Baltic*.[695] where the claim was successful but only upon proof of *crassa negligentia*.[696] As stated by Professor Thomas, "the decision in *The Delphinula* represents a watershed, for it witnesses the dissipation of the antecedent dilemma and a firm assertion of principle supportive of the concept of affirmative damages." He further remarks by reference to that judgment that the court ignored all admiralty precedent, discarded the tradition and sentiment of the admiralty court, and relying predominately on the interjection of Sir Charles Butt in *The Dwina*, it viewed the salvor from the exclusive perspective of the common law, and held that a salvor was under a duty to exercise care and skill reasonable in the circumstances.

A remarkable observation was that the court appeared to be influenced by the merger of the common law and admiralty effectuated by the Judicature Acts 1973-75 which resulted in "a substantive realignment which effectively bridged any preceding differences that might have existed".[697] Beyond that, the Court of Appeal pointed out that whereas salvorial misconduct would lead to a reduction in the salvage award, "...a claim would lie on counter-claim or by cross action or even an independent action for damages".[698]Another author has pointed out that "the Delphinula case is widely recognized as the first major English case where affirmative damages were introduced into case practice and where salvors were firmly placed under the scrutiny of common law rules on negligence".[699]

Finally, it is *The Tojo Maru*[700] that represents the culmination of the law of salvorial negligence. The *ratio decidendi* of that case is expressed succinctly and unequivocally in the headnote of the case report in the following words: "There is no rule of maritime law that a successful salvor cannot be liable in damages to the owner for the result of any negligence on his part".[701]

In that case, the 25,000 - ton Japanese tanker *Tojo Maru* collided with an Italian ship in the Persian Gulf and sustained extensive damage. Salvors Wijsmuller came on

---

[695] L.R. 4 A. & E 183.

[696] See D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 57, at p. 74.

[697] *Ibid*, at p. 75.

[698] *The Delphinula* (1947), 80 Ll. L.R. 459 (C.A.) at p. 484.

[699] Miso Mudric, *The Professional Salvor's Liability in the Law of Negligence and the Doctrine of Affirmative Damages*, LIT Verlag, 2013, at para. 5-84 at p. 199.

[700] [1971] Lloyd's Rep. 341 (H.L.).

[701] *Ibid,* at p. 341.

the scene and started salvage operations, in the course of which a diver of the salvage company fired a cox bolt gun against the outer plating of the hull. The bolt shot into cargo space which had not been gas freed; the result was an explosion causing extensive damage and a fire on board. Subsequently, however, the vessel was successfully salved and towed to a repair yard in Kobe, Japan. Following arbitration in London, the matter went before Willmer L.J. in the trial court and subsequently on appeal to the Court of Appeal. In the Court of Appeal, Lord Denning MR in perusing the precedents championed the cause of salvors and declared that "owners...are not entitled to counter claim damages for negligence. They can use it as a shield against paying high salvage reward, but not as a sword to pierce the salvors to heart."[702] As vividly remarked by Professor Cadwallader, Lord Denning's opinion was ultimately "to fall before the clinical lances of the House of Lords, where the liability of the salvor to answer charges of negligence was unanimously revealed".[703]

It is of interest to note in the context of the present discussion and the position of the subject in the current milieu that between the "shield" and the "sword" there continues to survive differences of strategic concern to the potential plaintiff. Needless to say, the "shield" concept denotes the penal approach taken by the admiralty courts of old discussed extensively above through citations of relevant case law. The "sword", in turn, represents the rapid move towards the common law notion of liability for negligence including the right of the salvee to counter-claim or to institute independent legal action against the salvor. In such case, the salvor not only loses or forfeits his award, but then has to dig into his pockets to pay for damages resulting from his negligent act. As remarked by Professor Thomas, the "shield" as a legal strategy is relatively more fluid and uncertain as it is subject to judicial discretion devoid of any readily discernable principles in terms of quantification.

Arguably, the development of an independent cause of action for affirmative damages undermines the object of public policy to encourage rescue and salvage services for those suffering distress at sea. However, the flip side of the coin is that one cannot deviate completely from the entrenched legal policy that a negligent actor must pay damages as a consequence of his act.[704]

In summary, the arbitral tribunal in the *Tojo Maru* case held that the salvors were liable for negligence and were not entitled to limit their liabilities which sentiment was echoed in the decision by Willmer J. at trial. He held that the salvors could not

---

[702] [1969] 3 All. E. R. at p. 1186.

[703] F.J.J. Cadwallader, "The Salvor's Duty of Care", *Maritime Studies Management*, 1973, at p. 3.

[704] D. Rhidian Thomas, "Salvorial Negligence and Its Consequences", [1977] 2 *LMCLQ* 167, at p. 173.

limit liability because limitation was based on the tonnage of a vessel and the diver who had committed the negligent act was not operating from the salvage tug, and therefore the tonnage of the tug could not be held to be applicable; and of course, it would be most unreasonable to use the tonnage of the tanker as a measure of limitation of the salvor.

In the Court of Appeal, Lord Denning held that there could be no liability for negligence on the part of the salvor, but the award should be adjusted to take account of his negligence. Undoubtedly, Lord Denning was expounding the "shield" approach in his dictum and expressing considerable leniency towards salvors. On appeal to the House of Lords, it was held that the salvor should first be given an award hypothetically as if there was no negligence on his part. However, the shipowner was entitled to counter-claim so that the salvor would have to assume liability for negligence and pay damages. Obviously, this was the "sword" approach that was taken by the House of Lords. The salvage award and damages on counter-claim being awarded were set-off against each other. The award was 125,000 pounds whereas the damages awarded for salvorial negligence was calculated at 330,000 pounds. Upon set-off, the difference of 205,000 pounds was ultimately payable by the salvor. No limitation of liability was allowed for the salvor for the reasons given by Willmer J. at trial.

Incidentally, a major outcome of the decision in terms of the issue of limitation of liability, was that in the International Convention for Limitation of Liability for Maritime Claims adopted in 1976,[705] a provision was inserted whereby a standard tonnage of 1,500 limitation tons was allocated for limitation of liability for salvors. Affording limitation to salvors for negligence liability was ground-breaking and without any precedent. Interestingly enough, if that limitation formula was applied in the *Tojo Maru* case, the results would have been dramatically different.

The House of Lords in the *Tojo Maru* followed the decision in the *Delphinula* although it is opined that the principle was expressed in the *Tojo Maru* in "less harsh and uncompromising language",[706] and the decision has been followed in other cases since then.[707] Undoubtedly, the law relating to salvorial negligence is firmly established through the decision of the House of Lords in the *Tojo Maru* case and its principle and essence has been adopted in the Salvage Convention 1989. Notably, no counterclaims were actually entertained in any previous cases although support for such proposition was expressed in *The Delphinula* as discussed above. In the worst-case scenario, a salvor's entire award could be forfeited even if he was

[705] 35 *ILM* 1433.

[706] D. Rhidian Thomas, "Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law", 2 *The Maritime Lawyer* 57, at p. 76.

[707] For cases since the *Tojo Maru*, see Brice, at paragraphs. 7-28 to 7-31.

successful but ordinarily, negligence would only result in the reward being reduced but never reduced to a level below zero.

10.4. Liability for Salvorial Negligence under Convention Law

There have been only two international conventions on salvage; namely, the 1910 and the 1989 Conventions. Notably, the 1910 Convention, which was essentially a codification of the extant customary law of salvage, addressed the question of salvorial negligence in the following way. In its Article 8, paragraph (a), mention is made of "risks of liability and other risks run by the salvors" in the context of the basis on which remuneration is to be fixed by the court under the Convention. Thus, there is tangential acknowledgement of the salvor's potential liability. Incidentally, the other factor on which remuneration is to be fixed is the "value of the property exposed to such risk", which would be relevant if the value was diminished due to the salvor's negligence. This matter is addressed in paragraph (b) which provides for deprivation of the salvor's remuneration or reduction thereof, in the event of fault on the part of the salvor in rendering the necessary salvage or assistance. The "fault" can be presumed to be of the negligent variety. Notably, however, there is nothing said about whether recourse in the form of a counterclaim or "affirmative damages" is available to the salvee in such event.

Incidentally, the 1910 Salvage Convention was never given effect through legislation even though the United Kingdom was originally a signatory to it because its contents substantially reflected the principles of English law making its enactment unnecessary.[708]

By contrast, the 1989 Salvage Convention duly signed and ratified by the United Kingdom appears in the Merchant Shipping Act 1995 in virtually complete form. Section 224 of the Act declares the Salvage Convention 1989 to be a part of the law of the United Kingdom and the Convention is reproduced verbatim in Part I of Schedule 11. What is important about the Salvage Convention, 1989 in the present context is that it has expressly provided in Article 8 that the salvor owes a duty of care presumably in the same vein as in the law of negligence under the common law. Article 8 provides that "[T]he salvor shall owe a duty to the owner of the vessel and other property in danger: (a) to carry out the salvage operations with due care; (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment; ..."

[708] Kennedy, at p. 5.

Even though the concept of "due care" signifies the standard of care, the Convention remains silent on the explanation of that term, presumably leaving it to be clarified by the domestic law of state parties. While it is notable that Article 8 provides for reciprocal duties *vis a vis* the salvor and the owner of the property under salvage, in the present context we are only concerned with the duty of care of the salvor. It is notable that nothing is said in that Article about the consequences of a breach of the obligation of due care. However, in Article 18 there is provision for the deprivation of the whole or part of the salvor's remuneration if the salvage operations were necessitated or rendered more difficult because of fault or neglect on his part. A combination of Article 8.1 (a) and (b) and Article 18 of the 1989 Convention clearly establishes that salvorial negligence can give rise to a reduction or forfeiture of the salvor's payment. Incidentally, Article 18 is a replica of Article 8, paragraph (b) of the 1910 Convention.

What exactly is "more difficult" has been left unaddressed in the Convention. Incidentally, the essence of Article 18 is reiterated in Article 14, paragraph 5 wherein it is provided that the special compensation of the salvor can be reduced or forfeited if the failure to prevent or minimize environmental damage results from his negligence. No positive liability to pay damages is imposed on salvors where the damage flowing from the salvor's negligence exceeds the payable salvage payments, which is the usual case in environmental protection services. Interestingly enough, the ensuing paragraph of that Article stipulates that "nothing in this article shall affect any right of recourse on the part of the owner of the vessel". A paradox seems to exist within the last two paragraphs of Article 14 in relation to the effect of salvors' misconduct in pollution cases.[709]

A point to be noted about "due care" in the Salvage Convention, 1989 as reflected in the Merchant Shipping 1995 is that it is inconsistent with the terminology used in the LOF which is "best endeavours" of the salvor. The anomaly is first, that the LOF incorporates the Salvage Convention 1989 by reference, and secondly, that it is subject to English law, which means that it is subject to both UK legislation as well as the English case law jurisprudence. Both the terms "due care" and "best endeavours' have been dealt with in the case law, and there is both judicial and scholarly opinion that the former is an objective test whereas the latter is subjective; and that "due care" is of a lower standard of care than "best endeavours".[710]

Others have opined that the standard of due care refers to the "standard of professional skill and care" while best endeavours points to a "substantive measure

[709] Donald A. Kerr, "The 1989 Salvage Convention: Expediency or Equity?", *Journal of Maritime Law and Commerce*, Vol.20, No.4, 1989, at p. 516.

[710] Catherine Redgwell, "The International Law of Salvage", 134 *Solic. J.* 414, 1990, at p. 415.

of care".[711] Indeed, there has been criticism that the Convention provides for a lower standard which potentially enables a negligent salvor to escape liability or reduce its effect.[712] It would appear that the reason for the Convention choosing "due care" over "best endeavours" was the public policy to encourage the provision of salvage services and to avoid discouraging casual or incidental salvors from undertaking salvage operations.[713] It is opined by a distinguished author that in deciding the salvor's standard of care in reference to the LOF, on balance, a court should "apply that construction which most encourages salvage operations".[714]

What is conspicuous by its absence in the Convention is the right of counterclaim or of independent action in terms of affirmative damages against the salvor of the owner of salved property arising from the consequences of damage caused by the salvor's negligence or lack of due care. Indeed, there is no indication in the Convention as to what remedy is available for the consequences of such salvorial negligence. As discussed in detail previously, this lacuna has been adequately covered in the *Tojo Maru* decision. Thus, whereas the Convention which came along much later, proceeded to incorporate the aspect of the *Tojo Maru* decision that the salvor owes a duty of care to the salvee, it failed to address the counterclaim issue which was a major element of that decision. It can therefore be said that the English law is a step ahead of the Convention in this regard even though unlike the 1910 Convention, the 1989 Convention has unequivocally imposed a duty of care to be observed by the salvor in carrying out his salvage operation.

10.5. Concluding Remarks

This brings to conclusion the discussion on liability for salvorial negligence tracing the beginnings of the regime historically to the extant law in the contemporary milieu. In a previous era, due to the public policy of encouraging salvors to undertake salvage operations fraught with risks and danger in the interest of sustaining the shipping industry, salvors were not liable for negligence unless his conduct fell within the purview of gross negligence or willful misconduct. In

---

[711] See Richard Shaw & Michael Tsimplis, "The Liabilities of the Vessel" in Yvonne Baatz (ed), *Southampton on Shipping Law*, London: Informa, 2008, at p.173.

[712] Nicholas J.J. Gaskell, "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990", *Tulane Maritime L.J.* 16 (1991-1992) 1, at p. 41; Michael Kerr, "The International Convention on Salvage 1989 – How It Came to Be", 39 I*nt'l & Comp. L. Q*. 530 (1990), at pp. 511-512.

[713] See Catherine Redgwell, "The International Law of Salvage", 134 Solic. J. 414, 1990 at p. 415.

[714] Nicholas J.J. Gaskell, "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990", 16 *Tulane Maritime Law Journal* 1, 1991, at p. 48.

modern times the debate was put to rest by the House of Lords in the *Tojo Maru* case in which salvors were decided to be held liable for negligence like other entities regardless of the public policy argument. This was also incorporated into Articles 8(1)(a) and (b) and 18 of the Salvage Convention, 1989.

A most closely related issue to salvorial negligence is the question of responder immunity. It is premised on the possibility of some reprieve being available to the salvor on the basis of responder immunity. The critical analysis in this chapter therefore paves the way for the related discussion on that phenomenon in the next chapter.

11. Responder Immunity

> "Considering that oil spills can have devastating economic and environmental consequences, without responder immunity there will, certainly, be issues whether or not responders are prepared to take the risks of liabilities that might be incurred."
>
> (Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Informa Law from Routledge, 2013, at p.571)

11.1. Preliminary Remarks

That salvage is a perilous undertaking needs no reiteration. Salvors not only run the risks of loss of financial benefits due to the harshness of the "no cure-no pay" rule, but also risks of damage to their vessels and equipment, not to mention the hazards of personal injury and other fatalities. Indeed, in the arena of environmental protection services, the risks are even higher given the public sensitivity towards marine pollution and the declining sympathy towards salvors in pollution cases exemplified by incidents such as the *Erika*, *Prestig*e and *Tasman Spirit*. There is the added risk of liability, both civil and criminal, which was harshly manifested in these cases.[715]

The purpose of this chapter, as a "follow-on" to the previous chapter, is to examine the notion of responder immunity as it has been currently evolving in terms of civil and penal liability in the arena of salvage, and establish the linkage with liability for salvorial negligence. Given that responder immunity is largely an American concept flowing from statutory provisions, what is its equivalence in international law or other common law jurisdictions or whether there is a corresponding principle in those regimes is an obvious inquiry of interest to all associated with salvage and marine pollution. Finally, this chapter examines speculatively whether a firm regime of responder immunity in both civil and criminal terms, in the relevant international regimes could serve as a *quid pro quo* or trade-off for declining the salvage industry's plea for a separate standalone environmental award.

[715] See Brian F. Binney, "Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention", 65 *Washington Law Review* 639 (1990), at p. 643.

11.2. The Concept of Responder Immunity

A most important and remarkable observation is that responder immunity, both in terms of concept and terminology, is of American origin and of relatively recent vintage emanating from statute law. While the term "responder immunity" does not appear in the legislation, the U.S. Oil Pollution Act, 1990 (OPA 90)[716] amending the Federal Water Pollution Control Act[717] contains a provision bearing the caption "Exemption from Liability" stating that "a person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or is otherwise directed by the President", except for cases of (1) personal injury or wrongful death claims, (2) CERCLA claims, or (3) gross negligence or willful conduct of responders.[718] This is generally referred to as the "responder immunity" provision in OPA 90.[719]

One commentator has summarized in somewhat simplistic terms that the term "responder immunity" is used in the maritime sense to allude to law that protects persons who respond to maritime casualties, from liability for loss or damage resulting from their efforts and actions.[720] He does not elaborate on the nature of the liability but simply refers to "legal liability" presumably meaning that the liability could be civil or criminal. The public policy behind this concept is to encourage competent responders to promptly and actively prevent or mitigate the adverse consequences of casualties without the fear of unexpected claims for liability.[721]

In the context of maritime law, the term "responder immunity" was put forward to pinpoint "protection from the growing tendency of countries to impose strict civil and criminal liability in respect of damage caused by pollution".[722] It seems that the

[716] 33 U.S.C. §2701 et seq. (1990).

[717] 33 U.S.C. §1321 otherwise known as the Clean Water Act (CWA).

[718] Section 4201 (4)(A) and (B)(iii) and (iv) of the OPA 90.

[719] De La Rue & Anderson, at p. 602.

[720] Jim Shirley, "A Primer on Responder Immunity", *Marine News*, June 2010, available at http://www.americansalvage.org/marine-news/MN_June_2010.pdf.

[721] *Ibid.*

[722] Archie Bishop, "Salvors – The Need for Responder Immunity and Places of Refuge", Lloyd's List events, April 2002, at p.1.

concept only applies to oil pollution casualties and covers pollution or damage caused by oil and certain other specified hazardous substances.[723]

Two considerations need to be addressed in explaining the concept of responder immunity; namely, who is a responder and what is immunity, particularly from the perspective of a salvor**.** The role of a responder in the context of the term "responder immunity" arises only in extraordinary situations at sea, such as grounding, collision, stranding or *force majeure*. Since this research is only concerned with ship-source pollution cases, any person who rushes to the aid of a casualty is a responder and usually in oil or chemical spill cases, the salvor is usually a first responder in an emergency situation to prevent further damage. It corresponds to persons taking "preventive measures" under the ship-source pollution liability conventions including CLC and the HNS Convention.

There are several cadres of oil spill responders working on a contract basis. Their usual tasks are to contain spilt oil, collect the same into barges and the likes; they can redirect the flow of spilt oil to protect those areas that are environmentally more vulnerable, conduct cleanup operations and take other kinds remedial actions. Needless to say, however, salvors are the ones who provide the first line of defence and are almost invariably the first responders in the event of a serious oil or chemical spill. Their efforts usually yield the best results in terms of prevention and mitigation of environmental damage especially in terms of controlling the spread of pollution. In the view of one commentator, they should be afforded the benefit of responder immunity for both civil as well as criminal liability, at least if there is no evidence of gross negligence or willful misconduct.[724] Incidentally, to qualify as a responder for the purpose of OPA 90, he has to act in a manner consistent with the National Contingency Plan or pursuant to the direction by the President.

Immunity, in its legal sense, means exemption from legal proceedings or liability.[725] To be more specific, it connotes release or exemption from liability in a given situation in accordance with a given law, notably of a statutory kind. Immunity could be in respect of loss or damage otherwise leading to consequences that may be civil or penal in nature, and may arise from the same incident. The term may be misleading if it is construed as complete immunity from the consequences of fault on the part of a responder in the course of providing services. However, that is not quite the case. Usually, there are exceptions placed on immunity provisions. Under

---

[723] See Jim Shirley, "A Primer on Responder Immunity", *supra note* 720; See also Paul Hankins, "Responder Immunity – Its Time Has Come", available at the website of American Salvage Association at http://www.americansalvage.org/marine-log/ML-Jan2014.pdf.

[724] Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

[725] Definition of Immunity, Oxford Dictionaries, available at https://premium.oxforddictionaries.com/definition/english/immunity.

OPA 90, there are four exceptions to the responder immunity including cases of "personal injury or wrongful death" and "if the person is grossly negligent or engages in willful misconduct".[726] Immunity only applies to ordinary negligence or negligence *simpliciter* on the part of responders for oil pollution damage. In English salvage law, gross negligence or willful misconduct can deprive a salvor of his entire remuneration earned from a successful salvage operation and also render him liable for damages. This has been dealt with quite extensively in the last chapter. The corollary to that, at least in terms of American common law, is that a salvor cannot be liable for causing pollution damage to the salvee's ship or cargo unless there was gross negligence or willful misconduct on his part.[727]

In American jurisprudence, "willful misconduct" has been defined to mean "the intentional performance of an act, or the failure to act, with knowledge that injury or damage probably would result, or in such a manner as to imply reckless disregard of the probable consequences."[728] In *Tug Ocean Prince, Inc.* v. *United States* the court found a tug owner to have engaged in willful misconduct where the tow which was a barge struck a charted rock outside the navigation channel in the Hudson River.[729] The collision was attributable to the pilot's lack of familiarity with the hydrographic features of the river. The court also found that the owner failed to inform an experienced pilot who was on board, of the other pilot's lack of familiarity with the river. Among other failures of the owner which the court found, were included its failure to appoint a master and non-compliance with the requirement for keeping a lookout in the circumstances. It held that these acts were intentional and "constituted a reckless disregard of the probable consequences."[730]

In *Conway* v. *O'Brien*[731]the Supreme Court held that "gross negligence means something substantially more than simple negligence, but falls short of being such reckless disregard of the probable consequences as is equivalent to a willful and intentional wrong". In *Becker* v. *Tidewater Inc*,[732] it was held that "mere inadvertence or honest mistake does not amount to gross negligence.". One factor

---

[726] Section 4201 (4)(A) and (B)(iii) and (iv) of the OPA 90.

[727] *Ibid*.

[728] See *Pikelis* v. *Transcontinental & Western Air*, 187 F.2d 122 (2d Cir.), cert. denied, 341 U.S. 951 (1951); Tuller v. KLM Royal Dutch Airlines, 292 F.2d 775 (D.C. Cir.), cert. denied, 368 U.S. 921 (1961); *Berner* v. *British Commonwealth Pacific Airlines Ltd.*, 346 F.2d 532 (2d Cir. 1965); *Wing Haug Bank* v. *Japan Air Lines Co., Ltd.*, 357 F. Supp. 94 (S.D.N.Y. 1973).

[729] 584 F.2d 1151 (2d Cir.), cert. denied, 440 U.S. 959 (1978).

[730] Id. at 1151.

[731] *Conway* v. *O'Brien*, 312 U.S. 492, 495 (1941).

[732] 586 F.3d 358, 367 (5th Cir. 2009) (citing *Houston Exploration Co*. v. *Halliburton Energy Servs., Inc*., 269 F.3d 528, 531 (5th Cir. 2001)).

relating to the distinction between two expressions is the degree of risk inherent in the relevant activity. In the context of tanker navigation or handling of oil involving salvage operations, willful misconduct and gross negligence cannot be easily distinguished. Notably, specific regulatory requirements relating to prevention of oil spills and removal of oil may make every contravening act "serious and potentially intentional or reckless".[733]

11.3. Salvage and Responder Immunity

11.3.1. Salvors as Responders

In salvage cases involving pollution, salvors are usually required to carry out two tasks, one to perform salvage with the aim of saving property, and the other to provide environmental protection services to prevent or mitigate environmental damage in the course of a salvage operation. It is submitted that in such instances, a salvor has two identities, one as salvor *stricto sensu* and the other as a "responder" taking preventive measures to contain pollution damage.

Salvage is the first line of defence in a maritime casualty. If there is pollution damage associated with the casualty, salvors are in the best position to proceed to the site and provide environmental protection services. In that sense, salvors may be considered as loss mitigation partners to owners and insurers. In fact, there is information evidencing the considerable contributions of salvors in protecting the marine environment.[734]

While all this has been stated before, one observation is that in the course of carrying out salvage or environmental protection work, it may happen that oil escapes from the ship under salvage accidentally or by reason of an unavoidable voluntary act to save the ship. There are numerous examples of such deliberate actions. A fire-fighting operation may end up with quantities of shipboard oil being washed off the ship; oil cargo, fuel oil or oily ballast may need to be shifted into barges to lighten the ship in collision and grounding cases; and on occasion, oil cargo, for example

[733] Committee on Marine Salvage Issues, "Purposeful Jettison of Petroleum Cargo", National Academy Press: Washington D.C, 1994, at p.70

[734] According to the 2017 ISU Pollution Prevention Survey Results, In the period 1994 to end-2017, ISU members have provided services to casualty vessels carrying 28,206,376 tonnes of potential pollutants, an average of more than one million tonnes per year. See http://www.marine-salvage.com/media-information/our-latest-news/international-salvage-union-members-operations-in-2017/.

contained in drums or barrels stowed on deck, may need to be jettisoned.[735] In the old days, oil was spread on the surface of the sea to calm the waters in rough and choppy seas which hindered salvage operations. Hence the adage "oil in troubled waters" now used metaphorically. Presently, under Regulation 11(a) of Annex I of MARPOL, the prohibitory provisions of Regulations 9 and 10 of MARPOL do not apply to "the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea".[736] However, with increasing public concern for the environment, the maritime community seems to extend relatively less sympathy towards salvors. There are several instances of civil and criminal actions being instituted against them for pollution liability. These put salvors as responders in an unenviably vulnerable position.

11.3.2. Civil Liability

The phenomenon of responder immunity has largely been instigated by environmental protection legislation largely concerned with the risk of liability of responders in respect of oil spills, and the liability is primarily civil in scope. Even though the object of such legislation is to provide immunity to spill responders, according to some analysts, it is primarily designed to protect those involved in cleanup and containment operations, and not directed towards salvors as such. However, it is undeniable that salvors can reap the benefit of such legislation as much as other responders involved in cleanup and containment operations. Unfortunately, even if there is such legislation arguably internationally and definitely nationally in the United States and United Kingdom, there is a need for clearer and more specific legislation expressly protecting salvors. In the course of a salvage operation, even a small spill can attract civil liability in the absence of adequate immunity law, regardless of the fact that a small spill compromise can often prevent a large spill from happening.[737] As stated above, in the main the protection in question deals with the risk of civil liability, whether it is in respect of salvors or other responders, at both international and national levels.

---

[735] William L. Peck and Allan F. Elmore, "Responder Immunity and Salvage" in *Marine Transportation*, Proceedings of International Oil Spill Conference, 1995 at p. 237.

[736] Regulation 11 (a) of The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 of the United Kingdom mirrors the MARPOL provision.

[737] William L. Peck and Allan F. Elmore, "Responder Immunity and Salvage" in *Marine Transportation*, Proceedings of International Oil Spill Conference, 1995, at p. 237.

Channeling Provisions: Protection from Third-party Claims

Whereas the scope of US and UK legislation extends only to responder immunity situations within their respective jurisdictions, it is significant that the international conventions on ship-source pollution have dealt with the issue of potential civil liability of salvors providing environmental protection services to polluting ships through the so-called "channeling provisions". Under the Civil Liability Convention (CLC 1992)[738] for example, all claims such as those of victims who are third parties in respect of a salvage operation, are "channeled" through the registered owner. The exact wording including the chapeau of the provisions reads as follows:

> No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention … no claim for compensation for pollution damage under this Convention or otherwise may be made against:
>
> > (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
> >
> > (e) any person taking preventive measures.[739]

A virtually identical provision is to be found in Article 7 paragraph 5 (d) and (e) of the HNS Convention.[740] Notably, in both the CLC and HNS Conventions, the protection of the channeling provisions may be lost if the salvor inflicts damage as a consequence of his "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result".[741] Granted, it would be difficult if not impossible for a claimant on whom the burden would lie to prove this, it is still an impediment to the salvor's comfort of immunity from suit.[742]

---

[738] The International Convention on Civil Liability for Oil Pollution Damage 1992, 1956 *U.N.T.S.* 255.

[739] Article III, paragraph 4 of the CLC 1992.

[740] The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996, not in force) 35 *I.L.M.* 1406 amended by the Protocol of 2010, consolidated texts can be found at http://www.hnsconvention.org/fileadmin/IOPC_Upload/hns/files/2010%20HNS%20Convention%20Consolidated%20text_e.pdf.

[741] Article III, paragraph 4 of the CLC 1992; Article 7, paragraph 5 of the HNS Convention.

[742] Proshanto K. Mukherjee, "Refuge and Salvage", Chapter 10 in Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom,* Leiden/Boston: Martinus Nijhoff, 2006, at p. 287.

Unfortunately for the salvor, such channeling provision is not there in the Bunkers Convention.[743] It must be observed in this regard that the Bunkers Convention addresses bunker oil pollution regardless of whether the fuel is persistent or non-persistent oil, and in respect of all sea-going ships, not just oil or chemical tankers. As such, the need for salvorial assistance for preventing or minimizing environmental damage in respect of spills under the Bunkers Convention may be potentially greater than under the CLC.[744] During the diplomatic negotiations leading up to the adoption of the Bunkers Convention which is largely modelled on the CLC 1992, the relevant channeling provisions were deliberately deleted from the draft convention to remove protection from liability for other parties.[745] Consequently, a group of NGOs[746] combined to submit a proposal to the Diplomatic Conference calling for the re-insertion into the Convention of "a provision for the legal protection of persons taking reasonable preventative measures (including salvage) in response to a bunker oil spill".[747] The proposal was rejected but as a concession, a Conference Resolution was passed to be attached to the Bunkers Convention calling on State parties to consider including provisions in their domestic legislation when giving legislative effect to the Convention to exonerate the liability of persons taking reasonable measures to prevent or minimize the effects of bunker oil pollution.[748] It is opined by one author that in the absence of

[743] International Convention on Civil Liability for Bunker Oil Pollution Damage, (27 March 2001, entered into force 21 November 2008) 40 *I.L.M.* 1493.

[744] Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Inform Law from Routledge, 2013, at p.571.

[745] "Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Protection from Liability of Persons Taking Preventive and Salvage Measures", LEG/CONF. 12/8 (12th January 2001), at paragraphs 6-7.

[746] These include The International Tanker Owners' Pollution Federation Ltd. (ITOPF), The Baltic and International Maritime Council (BIMCO), Comité Maritime International (CMI), International Association of Independent Tanker Owners (INTERTANKO), International Association of Ports and Harbours (IAPH), International Chamber of Shipping (ICS), International Group of P&I Clubs (IG), International Salvage Union (ISU), Oil Companies International Marine Forum (OCIMF).

[747] SUMMARY in "Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Protection from Liability of Persons Taking Preventive and Salvage Measures", LEG/CONF. 12/8 (12th January 2001).

[748] "Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Draft Resolution on Responder Immunity" LEG/CONF. 12/11 (6 February 2001); "Adoption of The Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: Conference Resolutions", LEG/CONF. 12/18 (27 March 2001); See also Patrick Griggs, "International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001", available on the website of British Maritime Law Association at https://www.bmla.org.uk/documents/imo-bunker-convention.doc Following the resolution, several states, including the U.K., Denmark, Finland, Malta and Norway, provided such immunity for salvors in their domestic legislations. See Norman A. Martinez, *Limitation of*

appropriate immunity provisions, given the environmental and economic challenges and consequences involved in oil spills, responders including salvors will be reluctant or less inclined to take on the risks of potential liabilities.[749]

As distinguished from cleanup and containment operators who enter the scene and go to task invariably after the fact, salvors are primarily preventers of environmental damage, but when a pollution does occur after a collision or grounding, salvors as responders can intervene and take mitigative measures to limit the extent of damage by preventing further leakage of the pollutants. Thus, on the whole, salvage is more "cost-effective" from the point of view of the government authorities responsible for pollution control as well as shipowners.[750] However, salvors have concerns regarding immunity because of their vulnerability to liability for negligence. This is particularly so because most often they are also the last line of defense in a catastrophic oil spill situation. Under the present salvage law, they owe a duty of care to the salvee and the consequences of such civil liability can be quite drastic ending up with the salvor going out of pocket if the damage in monetary terms exceeds the remuneration that he may otherwise receive. This has been exhaustively discussed in Chapter 10.

One commentator has perceptively but mistakenly pointed out that in a typical oil spill case even where the CLC and/or the Fund Convention may be applicable, if the compensation funds are exhausted, claimants will target salvors.[751] On the other hand, the absence of relief by way of responder immunity doubtless has a negative effect on the salvor's enthusiasm and ability to respond to a spill proactively and expeditiously.[752] The luxury of carrying out a well-calculated risk assessment is not often available to make the best professional judgment in light of the ship's condition and the extent of the damage in question. Furthermore, the salvor is frequently under the inquiring eyes of the authorities and in his anxiety to save or prevent the greater loss, he indulges in an act causing some degree of pollution from which he may have no respite if there is no immunity available for him.

Liability in International Maritime Conventions: The relationship Between Global Limitation Conventions and Particular Liability Regimes, Routledge, 2011, footnote 14 at p. 164.

[749] Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Inform Law from Routledge, 2013, at p.571

[750] Roger Evans, "Pollution from Ships" Responder Immunity, The Nautical Institute, Southampton, 2007, at pp. 2-3, available at http://www.nautinstlondon.co.uk/nautinstlondon/wp-content/uploads/2012/04/Roger-Evans-Paper-Responder-Immunity.pdf.

[751] *ibid*.

[752] Arnold Witte, "Salvors voice concern over IMO Bunker Spill Convention", available on the website of ISU at http://www.marine-salvage.com/media-information/articles/archive/salvors-voice-concern-over-imo-bunker-spill-convention/.

On the civil side of the equation, the main concern for the salvor is his potential liability in respect of third-party actions. As discussed above, the salvor's concern is covered by the CLC and HNS Convention providing that no claims are to be made against salvors subject to the proviso that there was no "personal act or omission, committed with the intent to cause … damage", or that the salvor had not acted "recklessly or with knowledge that such damage would probably result". It is well acknowledged that the proviso is a virtually "watertight provision", meaning that given the onus of proof lying with the third party, it would be well-nigh impossible to prove the existence of those elements. In other words, the salvor is well-protected from third parties' claims for compensation within the ambit of the conventions. However, a third-party claimant may seek a remedy outside the convention, if remedies within the convention in question are exhausted, such as where the limitation fund is depleted. Regardless of whether any law outside the convention provides for responder immunity *stricto sensu*,[753] in the absence of such law, the salvor could find himself in a sorry state facing multiple actions in multifarious jurisdictions. In such case, statutory protection possibly through national legislation, as in the case of the United States and the United Kingdom, would be of immense benefit to the salvor.

Right of Recourse: The Law Giveth and the Law Taketh Away[754]

The channeling provision under the CLC and HNS Convention ostensibly protects salvors from liability for pollution damage caused in providing environmental services. However, the wording "no claim for compensation for pollution damage may be made against" merely affords protection from being directly sued by the victims of pollution damage. It does not prevent claims of the shipowner against the salvor by way of recourse. The protection provided by the channeling provision is "subject to paragraph 5 of this Article". The cross-referred paragraph 5 provides that - "Nothing in this Convention shall prejudice any right of recourse of the owner against third parties." In this paragraph, "third parties" points to entities other than the owner and pollution victims. Thus, salvors, among such entities, are protected from direct action by third parties provided there is no gross negligence or willful misconduct on their part but are potentially exposed to liability by way of recourse initiated by shipowners, based on alleged salvorial negligence. Hence, the net effect is that there is really no immunity from liability for negligence *simpliciter* for salvors under CLC 1992 or the HNS Convention given that recourse action can be

[753] the detailed analysis will unfold in paragraph 10.3.1.3.

[754] Huiru Liu, "Salvors' Provision of Environmental Services: Remuneration, Liability and Responder Immunity", 24 *Journal of International Maritime Law*, 2018, at p. 293

brought by the shipowner against them.[755] In other words, the law through paragraph 4 of Article III of CLC 1992, gives immunity with one hand and takes it away with another through paragraph 5. As rightly pointed out by the British Maritime Law Association (BMLA), "[T]he immunity of salvors under CLC 1992 would not be available in case of a recourse action as contained in Article III, paragraph 5".[756]

National Law Regimes

In the course of discussions within CMI on the question of places of refuge for ships in distress or otherwise in need of refuge, such as for example, leaking oil, a questionnaire was distributed in 2003 among national Maritime Law Associations (MLAs) who were CMI members. Question 4 of the questionnaire was whether "any liability would attach to a person other than the shipowner providing assistance to the ship in distress" Notably, 18 MLA members responded. Their detailed responses were reported in the CMI Yearbook of 2003.[757]

The report entitled "Responses to Second Questionnaire" contained varieties of responses, some very useful; others somewhat less proximate to the question asked. A number of MLAs made exclusive references to salvors. Most made cross-references to the channeling provisions in the CLC which would apply assuming their states were parties to that convention but some referred to domestic legislation which specifically made certain parties liable or not liable including liability for costs incurred by a responder or the shipowner. Others simply indicated that there was no domestic legislation in their jurisdiction addressing the subject-matter of responder immunity. Not all MLAs responded directly to the question asked but went on to discuss liability for salvorial negligence.[758]

Even though the title of this section ostensibly indicates coverage of numerous common and civil law jurisdictions, this thesis is focused on common law. Thus,

---

[755] Article 7, paragraph 6 of the HNS Convention intentionally grants the right of recourse to owners against responders, providing that "Nothing in this Convention shall prejudice any right of recourse of the owner against any third party, including, but not limited to, the shipper or the receiver of the substance causing the damage, or the persons indicated in paragraph 5 (the channeling provision)".

[756] "Appendix to Report on Places of Refuge Submitted by Comité Maritime International (CMI) to the IMO Legal Committee: Details of Responses To Second Questionnaire", CMI Yearbook 2003, at p. 326.

[757] See "Appendix to Report on Places of Refuge Submitted by Comité Maritime International (CMI) to the IMO Legal Committee: Details of Responses to Second Questionnaire", *CMI Yearbook* 2003, at pp. 324-326.

[758] A good summary of the responses given by National Maritime Associations is to be found in Proshanto K. Mukherjee, "Refuge and Salvage", Chapter 10 in Aldo Chircop and Olof Linden (Eds.) *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom,* Leiden/Boston: Martinus Nijhoff at pp. 288-289.

the author would like to maintain the tone and leave the civil law regimes to be addressed in the above-mentioned "Responses To Second Questionnaire". Since the concept is of United States origin, it is appropriate to start with the response from the United States MLA. The English law to some extent followed the steps of the United States, which is presented in the response from British MLA. Another major common law jurisdiction, Australia, also deserves attention as it has recently introduced and actually utilized the term "responder immunity" in its legislation.

The United States Law

The United States MLA points to the OPA 90 as the basis for responder immunity.[759] Despite the exact phrase "responder immunity" not appearing in the OPA 90, it is widely accepted as a short cut indication to the added "Exemption from Liability" provision in OPA 90, which reads:

> (4) EXEMPTION FROM LIABILITY.
>
> (A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or is otherwise directed by the President.
>
> (B) Subparagraph (A) does not apply -
>
> (i) to a responsible party;
>
> (ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
>
> (iii) with respect to personal injury or wrongful death; or
>
> (iv) if the person is grossly negligent or engages in willful misconduct.
>
> (C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).[760]

The legislation apparently suffers from a lack of clarity. There is, for example, no clear indication of who exactly are covered and protected by this so-called responder

[759] See "Appendix to Report on Places of Refuge Submitted by Commité Maritime International (CMI) to the IMO Legal Committee: Details of Responses to Second Questionnaire", *CMI Yearbook* 2003, at p. 326.

[760] Section 4201(c)(4) of the OPA 90, also cited as section 311(c)(4) of the Federal Water Pollution Control Act as amended by the former.

immunity provision; in particular, there is no mention of salvors receiving protection from third party claimants.[761] One point is clear; that is, that the "exemption from liability" operates in relation to "a discharge or a substantial threat of oil or a hazardous substance.[762] and is thus applicable to those involved in spill cleanup operations. But it is unclear as to whether the exemption applies in favour of salvors who are tasked with containment of the pollutant on board the salvee's vessel, which would be the most rational way to protect the marine environment.[763] In the opinion of others, "an analysis of the OPA responder immunity provision demonstrates its shortcomings in protecting salvors". On first glance, it seems that the provision in sub-paragraph (4)(A) gives broad protection to responders but it is evident from sub-paragraph (4)(B) that the provisos and exceptions "swallow up the rule for salvors".[764] At any rate, from a salvor's perspective, the immunity clearly does not apply to salvage of property, and therefore, there is no respite for salvors in respect of liability for negligence in such cases.

It is also to be noted in this context that the OPA 90 responder immunity provision does not apply to the release or discharge of hazardous substances. Other legislation only protects responders against strict liability, not liability for ordinary negligence.[765] Without delving deep into American pollution legislation of sorts, suffice it to say that responder immunity, it seems, is unfortunately not applicable to the threat of criminal liability, particularly where criminal sanctions are on the rise in oil spill cases. It may well be that in the circumstances, a salvor may even be exposed to criminal liability in the absence of gross negligence or willful misconduct; or worse, in the absence of any fault at all. Thus, under this statutory regime, it is quite possible that even if responder immunity protects a salvor from civil liability, he may still be liable criminally.[766]

---

[761] Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

[762] Section 4201 (4)(A) of the OPA 90.

[763] Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

[764] William L. Peck and Allan F. Elmore, "Responder Immunity and Salvage" in *Marine Transportation*, Proceedings of International Oil Spill Conference, 1995 at p. 238, available at http://www.ioscproceedings.org/doi/pdf/10.7901/2169-3358-1995-1-237. The Spill Control Association of America proposed to clarify and define the responding actions relating to discharge of oil or hazardous substances which enjoys immunity under OPA 90 to include "firefighting, salvage, wreck removal, dispersant application, in-situ burning, well control, and any other oil or hazardous material or substance mitigation, removal, response or recovery actions, and any management, consultation, administration, command, oversight, or supervision of these actions or related actions", see "Responder Immunity Proposal", available at http://www.scaa-spill.org/presentations/2012-hill-visit/Leave-Behind_Responder-Immunity-and-Deepwater-Horizon.pdf.

[765] De La Rue & Anderson, at p. 602.

[766] Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

Incidentally, responder immunity as engendered and developed under United States law, only pertains to marine pollution, albeit going beyond ship-source pollution and including pollution emanating from the sea-bed. This realization was driven home in the *Deepwater Horizon* incident which was an oil rig blowout resulting in a massive oil spill in the *Macondo* prospect. Actions were brought by pollution victims against the emergency response vessels which went to the rig to attempt to contain the blowout. Some 20,000 claims were dismissed but 11 remained unresolved. The clean-up contractors as responders were referred to as the "Clean-Up Defendants" in the actions.[767] In the case in question, plaintiffs sued the responders for personal injuries allegedly caused by exposure to spilled oil and government-approved dispersants claiming gross negligence and willful misconduct on the part of the responders. The action culminated in the dismissal of the claims by the US District Court for the Eastern District of Louisiana in 2016 after five years of protracted litigation.[768] This led to numerous calls for enhancement of responder immunity under the US law.[769] Since the present thesis is about salvage and ship-source pollution, the complexities and intricacies of the *Deepwater Horizon* episode, as intriguing as they may be, are not addressed here and can be found in other scholarly works.[770]

A notable case involving a claim against salvors by third parties in a pollution incident was the action brought in the United States courts against Bugsier following the *Amoco Cadiz* oil spill which occurred off the coast of Brittany in France in 1978. In dismissing the claim, the court held that a salvor whose efforts were not successful was not liable for loss or damage "in the absence of proof of causative gross negligence or willful misconduct". The court found that the salvors had at all times used their best endeavours and that there was no evidence of misconduct.[771] Thus, a salvor does not incur liability simply because he has commenced providing

---

[767] Michael J. Wray & Rachel Reese, "Does A Good Deed Go Unpunished? The Availability of Responder Immunity in An Oil Pollution Response", 8 *Texas Journal of Oil, Gas and Energy Law* 349, 2012-2013, at p. 364.

[768] See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, 808 F. Supp. 2d 943 (E.D. La. 2011), *aff'd sub nom. In re Deepwater Horizon,* 745 F.3d 157 (5th Cir. 2014).

[769] See Jonathan K. Waldron, "The Need for Enhanced Responder Immunity for Salvors Based on Lessons Learned from the *Deepwater Horizon*", available at the website of American Salvage Association at http://www.americansalvage.org/soundings/Fall2011.pdf; See also Spill Control Association of America, "Responder Immunity And The *Deepwater Horizon*", available at http://www.scaa-spill.org/presentations/2012-hill-visit/Leave-Behind_Responder-Immunity-and-Deepwater-Horizon.pdf.

[770] For details and analysis of the case, see Michael J. Wray & Rachel Reese, "Does A Good Deed Go Unpunished? The Availability of Responder Immunity in An Oil Pollution Response", 8 *Texas Journal of Oil, Gas and Energy Law* 349, 2012-2013.

[771] *Amoco Transport Co.* v *Bugsier Reederei and Bergungs, A.G* (1981) 659 F.2d.789 (Courts of Appeals, Seventh Circuit) The "Amoco Cadiz", [1984] 2 Lloyd's Rep. 304 (US Dist. Ct., Illinois)

services to a casualty but has failed to prevent pollution.[772] In the observation of this author, the decision exemplifies the granting of immunity to salvors for ordinary negligence.

The United Kingdom Law

The British MLA (BMLA) wrote quite an informative reply including potential liability of persons in connection with inter-ship transfers of cargo, stores, fuel or ballast waters for failure to comply with directions from relevant authorities. Salvors could face liability under ordinary principles of tort law and also the breach of duty of care enshrined in Article 8 of the Salvage Convention, 1989. Even though the BMLA response referred to the channeling provision in the CLC on immunity "from suit in negligence", the corresponding governing legislation on responder immunity for oil pollution is section 156(2) of the Merchant Shipping Act 1995 provides as follows:

> 156. Restriction of liability for oil pollution
>
> (1)...(b)
>
> > (ii) no person to whom this paragraph applies shall be liable for any such damage or cost unless it resulted from anything done or omitted to be done by him either with intent to cause any such damage or cost or recklessly and in the knowledge that any such damage or cost would probably result.
>
> (2) Subsection (1)(ii) above applies to—
>
> > (d) any person performing salvage operations with the consent of the owner of the ship or on the instructions of a competent public authority;
> >
> > (e) any person taking any such measures as are mentioned in subsection (1)(b) or (2)(a) of section 153 or 154;[773]

Obviously, Article 156(2) mirrors Article III paragraph 4 of the CLC 1992 to which the U.K. is a party. However, the Merchant Shipping Act 1995 departed from the CLC 1992 by stipulating that no salvor providing services "shall be liable" for oil pollution, which offers proper immunity for salvors.[774] Notably, salvors have to obtain the consent of the owner or the competent authority to qualify for immunity, which translates into the fact that a salvor rushing to the aid of an abandoned tanker

[772] Kennedy, at para.12-003

[773] Equivalent of the "preventive measures" under the CLC 92.

[774] This point will be addressed in the following section 10.3.1.3.

is not immune from pollution liability.[775] Needless to say, gross negligence and willful misconduct will deprive them of immunity.

The United Kingdom is also a state party to the Bunkers Convention 2001. It is enacted in by The Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006,[776] which amend Chapter 3 of Part 6 of the Merchant Shipping Act 1995 in order to implement that Convention, and entered into effect in 2008. Even though no channeling provision, let alone responder immunity, exists in the Bunkers Convention 2001, Section 8 of those Regulations amending Section 156 (Restriction of liability for oil pollution) of the Merchant Shipping Act 1995 grants responders the immunity for pollution damage for bunker oil.

The Australian Law

Notable also in the context of the CMI questionnaire is that the Australian MLA referred to the channeling provisions of the CLC 1992 and the HNS Convention as protection for responders to oil and hazardous substances spills. Section 8 of the Protection of the Sea (Civil Liability) Act 1981[777] gives effect to Article III of the CLC 1992.[778] Interestingly enough, the Australian MLA expressed that there was a move afoot to include relevant responder immunity provisions in its legislation giving effect to the Bunkers Convention. This did not happen at first in the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 as an Act to give effect to the Bunkers Convention but came through recently through the Protection of the Sea Legislation Amendment Act, 2010 (the Amendment Act 2010)[779] amending the former. Item 3 of Schedule 2 - Responder Immunity of the Amendment Act 2010 reads as follows:

> 3 Before section 25
>
> Insert: 24A Responder immunity
>
> (1) Subject to this section, no civil action, suit or proceeding lies against a person in relation to anything done, or omitted to be done, reasonably and in good faith by the

[775] Brice, para.7-161.

[776] S.I. No. 1244 of 2006. These Regulations amend Chapter 3 of Part 6 of the Merchant Shipping Act 1995 in order to implement the Bunkers Convention 2001.

[777] Registered No. C2016C00625.

[778] Section 8 Certain provisions of Convention to have the force of law: (1) The following provisions of the Convention have the force of law as part of the law of the Commonwealth: Articles I to VI (inclusive), paragraphs 1, 8 and 9 of Article VII, Article VIII, paragraphs 1 and 3 of Article IX, Article XII bis (other than paragraph (b)), paragraph 1 of Article XI.

[779] C2010A00116.

person in relation to preventing or minimising pollution damage occurring in Australia or the exclusive economic zone of Australia.

Exceptions

(2) Subsection (1) does not prevent an action, suit or proceeding from being brought against the shipowner or shipowners concerned (including on the basis of vicarious liability).

(3) Subsection (1) does not apply in relation to anything done, or omitted to be done:

(a) with intent to cause damage; or

(b) recklessly and with knowledge that damage would probably result.

The Act grants statutory immunity from civil action, suit or proceeding to salvors and persons responding to a casualty or oil spill. The immunity of the salvor or other responder will not operate in respect of a civil suit if the responder acts unreasonably or in bad faith or with "intent to cause damage; or recklessly and with knowledge that the damage would probably result".[780] Salvors and other responders must therefore continue to exercise due diligence in a reasonable fashion when carrying out response activities. It seems however, that inadvertent pollution incidents will not necessarily deprive a responder from immunity from civil actions; at least, response actions can be undertaken in the knowledge that the intention of the law is so.

It is obvious that Item 3 is a manifestation of Australia responding to the Conference Resolution of the Bunkers Convention regarding responder immunity and following its recommendation to refer to Article 7 paragraph 5 (a)(b)(d)(e) and (f) of the HNS Convention as a legislative model.[781] In the relevant parliamentary second reading speech with respect to the Amendment Act 2010, the policy behind providing statutory immunity to responders was rationalized on the basis that it was "… essential that persons and organizations not be deterred from providing assistance following an oil spill because they think they may become liable if their actions inadvertently lead to increased pollution".[782]

[780] *Ibid.*

[781] LEG/CONF. 12/18 (27 March 2001).

[782] See Robert Wilson & Nathan Cecil, "Oil Pollution Responder Immunity Now Part of Australian Law", *News & Events*, December 2010, available at http://documents.jdsupra.com/2da2e4cc-56c1-415b-a7e3-25304892ad9b.pdf.

International Law and National Law Contrasted

In the case of ship-source pollution, liability is largely governed internationally by the CLC 1992, the HNS Convention and the Bunkers Convention. The first two supposedly provide protection for salvors through the channeling provisions disallowing civil claims brought against them by third parties who can only bring action against registered shipowners. It is often considered, both by practitioners and academics, that the channeling provisions in the CLC 1992 and the HNS Convention provide responder immunity.[783] Acknowledging that fact and disagreeing with what several commentators have claimed, this author holds the view that the channeling provisions in those two conventions involve responders but provide no "immunity" in its true sense.

Article III, paragraph 4 of CLC simply provides that "no claim for compensation for pollution damage under this Convention or otherwise may be made against" a group of entities including responders, which is a mere barring of the claim. Article 7, paragraph 5 of the HNS Convention contains virtually identical words.

By contrast, the OPA 90 of the United States provides that a responder "is not liable for removal costs or damages which result from rendering care, assistance, or advice", subject to the National Contingency Plan and the directions of the President. On the other side of the Atlantic, the Merchant Shipping Act 1995 of the United Kingdom, a state party to the CLC 1992 and a signatory, subject to ratification, to the HNS Convention, has abandoned the model set by the CLC 1992 and explicitly provides that no salvor or other responders "shall be liable" for damage or cost if he carried out services with the consent of the ship owner or on the instructions of a competent public authority.[784]

The difference between the "no-claim-may-be-made-against" protection under the CLC and HNS Convention and the "no-person-shall-be-liable" immunity under the domestic legislation of the U.K. and U.S. is self-evident. Therefore, arguably, Article III, paragraph 4 is not an "immunity from liability" provision respecting the salvor as a responder. More importantly, this is substantiated by and reinforced in paragraph 5 of that Article which provides - "Nothing in this Convention shall prejudice any right of recourse of the owner against third parties." The net effect is

[783] See Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Inform Law from Routledge, 2013, at p.571; See also "Appendix to Report on Places of Refuge Submitted by Comité Maritime International (CMI) to the IMO Legal Committee: Details of Responses To Second Questionnaire", *CMI Yearbook* 2003, at pp. 324-326. It is notable that De La Rue & Anderson refers to "responder immunity" with quotation marks when referring to channeling provisions in the ship-source pollution liability conventions, (De La Rue & Anderson, at p. 262) but without quotation marks when referring to the "exemption from liability" provision under OPA 90 (De La Rue & Anderson, at p. 602).

[784] Merchant Shipping Act 1995, s.156 (1)(b)(ii) and (2)(d).

that salvors, among other groups of entities, are protected from direct action by third parties provided that there is no gross negligence or willful misconduct, yet they are exposed to liability for pollution damage by way of recourse action initiated by shipowners. Hence, there is no real responder immunity under the CLC 1992. The same applies in respect of the HNS Convention.[785] It is rightly pointed out by the British Maritime Law Association (BMLA), even though the word "immunity", in this author's view, is misused, that "the immunity of salvors under CLC 1992 would not be available in case of a recourse action as contained in Article III, paragraph 5".[786] Again, one commentator summarized the Responses to the Second Questionnaire as follows:

> … most National Associations identified the channeling provisions in the CLC which grant responder immunity (Article III paragraph 4(d)) and confirm that the ship owner would have the responsibility unless third parties have acted with intent to cause damage or with knowledge that the damage would probably result. They also pointed out, as has been seen earlier, that recourse actions may lie at the suit of the ship owner where there has been negligence by a third party.[787]

Interestingly enough, such shipowners' right of recourse against salvors brings in the application of the law of salvorial negligence. In addition, there enters into the picture what was decided by the House of Lords in the *Tojo Maru* case[788] which is subsequently endorsed in the Salvage Convention, 1989 in Article 8 (1) (a) and (b). Under the *Tojo Maru* doctrine, in terms of English law, which is the governing law for the LOF, and the Salvage Convention, 1989, the salvor owes a duty of care. A breach of that duty and evidence of damage renders the salvor liable even for ordinary negligence or negligence *simpliciter*. Incidentally, under the channeling provisions of the CLC and HNS Convention providing for third party immunity, the formula of "personal act or omission, committed with the intent to cause … damage", or that the salvor had not acted "recklessly or with knowledge that such damage would probably result" must be met. Whether that phraseology is indicative of, or is tantamount to gross negligence or willful misconduct is not something that has been conclusively answered by the courts.

---

[785] Article 7, paragraph 6 intentionally grants the right of recourse to owners against responders, providing that "Nothing in this Convention shall prejudice any right of recourse of the owner against any third party, including, but not limited to, the shipper or the receiver of the substance causing the damage, or the persons indicated in paragraph 5 (the channeling provision)".

[786] "Appendix to Report on Places of Refuge Submitted by Comité Maritime International (CMI) to the IMO Legal Committee: Details of Responses To Second Questionnaire", *CMI Yearbook 2003*, at p. 326.

[787] Stuart Hetherington, "Civil Liability and Monetary Incentives for Accepting Ships in Distress", *CMI Yearbook* 2003, at p. 460.

[788] [1971] 1 Lloyd's Rep. 341 (H.L.).

Seemingly, the channeling provisions in the conventions have the intention and expectation to provide solid protection, if not immunity, from liability to encourage salvors and other responders to provide services.[789] It is submitted that either deficient draftsmanship or the inherent complexity and ambiguity of a convention regime being a compromise of various jurisdictions has failed that expectation. The "no-claim-may-be-made-against" protection for salvors did protect them from being sued by third parties with "a scattergun approach to litigation"[790] which itself is time and cost consuming and most disappointing. However, it is not the equivalent of immunity since the granting of right of recourse to shipowners for the same incident, leaving salvors indirectly exposed to, but never exonerated from, civil liability for pollution damage.

Unfortunately, in order to relieve responders of their concerns that "they may become liable if their actions inadvertently lead to increased pollution",[791] Australia has recently chosen to adopt the convention model to provide responder immunity for bunker oil pollution damage. In the view of this author, the use of the term "Responder Immunity" in the legislation[792] does not necessarily make protection from direct action from third parties the same thing as immunity.

No real case has ever emerged to detect the deficiency of the combination of a "no-claim-may-be-made-against" protection for salvors and others plus a granting of right of recourse to shipowners under the convention regimes. The recent case of *Deepwater Horizon* in America serves as a reminder which exposed the loopholes in the responder immunity provision in the OPA 90, a *stricto sensu* immunity, and left responders suffering and eager for an enhancement of that immunity.[793] It may be too late to realize that there is no immunity but only limited protection for salvors in the convention regimes after a suit is brought against responders for pollution liability resulting from their services without gross negligence or willful misconduct. Undoubtedly, such eventuality will shake the whole response industry in a negative way.

---

[789] Archie Bishop, "Salvors – The Need for Responder Immunity and Places of Refuge", Lloyd's List events, April 2002, at p. 5.

[790] Archie Bishop, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): *Liability regimes in contemporary maritime law.* London: Informa, pp. 99-105, at p. 100.

[791] Robert Wilson & Nathan Cecil, "Oil Pollution Responder Immunity Now Part of Australian Law", *News & Events*, December 2010, available at http://documents.jdsupra.com/2da2e4cc-56c1-415b-a7e3-25304892ad9b.pdf

[792] Schedule 2 – Responder Immunity of the Protection of the Sea Legislation Amendment Act 2010.

[793] A well-known commentator pointed out the loopholes of the responder immunity provision in the OPA 90 before the *Deepwater Horizon* case hoping no claim will be brought against salvors or other responders under OPA 90 based on oil spilled as a result of their efforts in rendering assistance to a casualty. See Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

11.3.3. Penal Liability

In the previous section, the discussion has centred primarily on the question of responder immunity pertaining to civil liability. Some perceive the phenomenon to be associated only with civil liability.[794] However, liability is not exclusively a matter of civil or private law and, therefore, the question of immunity also arises in connection with liability that is not of the civil variety. Often, the term "criminal" liability is used to signify that. Indeed, some authors perceive the notion of responder immunity as belonging only to the criminal law domain referring to "criminalization" and immunity from it.[795] Others seem not to distinguish the two fields of law in that context and refer to the salvor's "duty of care" and him being "liable for damages" as a consequence of negligence; and in the same breath almost, refer to the need for his protection from "criminal liability".[796]

The present author disagrees with the view that responder immunity only has to do with civil liability, and also with the proposition that on the public law side of the equation, it is all criminal law and that it is strict liability without exception. Furthermore, criminal liability and criminalization are different in concept and scope. This is elaborated below to the extent that the discussion is relevant to the present topic in context. This author chooses to use the term "penal" instead of "criminal" because there is a difference between the two which will become apparent from the text below. It is submitted that not all things penal are criminal in nature.[797]

Starting with conventions in the maritime field, the only convention dealing with marine pollution that addresses violations is MARPOL.[798] At this juncture, it is worthwhile to observe that conventions only create violations and do not impose sanctions. It is left to the domestic legislation of state parties to the convention to

---

[794] Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Inform Law from Routledge, 2013, at p.571.

[795] See Joseph Collum, "Salvage: Making a Bad Situation Worse", *The Maritime Executive*, available at http://www.maritime-executive.com/magazine/global-salvage-review.

[796] Roger Evans, "Pollution from Ships" Responder Immunity, The Nautical Institute, Southampton, 2007 at p. 3, available at http://www.nautinstlondon.co.uk/nautinstlondon/wp-content/uploads/2012/04/Roger-Evans-Paper-Responder-Immunity.pdf; See also, Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

[797] Proshanto K. Mukherjee, "The Penal Law of Ship-Source Pollution" in Tafsir Malick Ndiaye & Rudiger Wolfrum (Eds), *Liber Amicorum Judge Thomas A. Mensah: Law of the Sea, Environmental Law and Settlement of Disputes",* Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston: Martinus Nijhoff September 2007, pp. 463 – 496.

[798] International Convention for the Prevention of Pollution from Ships (MARPOL 1973) as modified by the Protocol 1978 relating thereto (MARPOL 73/78), *U.N.T.S.* No.22484.

transform violations into offences and provide for appropriate sanctions under the penal law of that state.[799]

Offences in domestic law can be categorized according to their seriousness and commensurate sanctions are created which vary in severity corresponding to the offence in question. At the top of the scale, the most serious offences are criminal in nature which if prosecuted must meet three requirements for the prosecution to succeed. These are *mens rea*, *actus reus* and the contemporaneity of the two. As it has been said, only a guilty mind makes for a crime.[800] At the lowest level are those which are referred to as absolute liability offences where only the *actus reus* need be proven to obtain a successful prosecution.[801] In the middle zone lies those offences that are at a lower threshold than criminal because of their relatively low level of seriousness. These are regulatory or public welfare offences which have been characterized as "half-way house" offences said to be lying in a "field of conflicting values".[802] These offences so characterized need no proof of *mens rea* but the accused is afforded the defence of due diligence to exonerate himself. In this process, the onus is reversed whereby the accused must prove on a balance of probabilities that he took all reasonable measures to avoid the commission of the offence. If he succeeds, he is exonerated; if he is unable to discharge that burden, he is punished as if it were a criminal or *mens rea* offence.[803]

In line with the age-old adage that "punishment must fit the crime" or *culpae poenae par esto*, the sanctions for offences variously characterized must be commensurate with the seriousness of the offence. Indeed, in terms of marine pollution cases, sanctions are circumscribed by the basic principle set out in Article 230 of UNCLOS under which only monetary penalties may be imposed "except in the case of a willful

---

[799] Proshanto K. Mukherjee and Mark Brownrigg, *Farthing on International Shipping*, Fourth Edition, Berlin, Heidelberg: Springer-Verlag, 2013, at p. 233.

[800] Glanville Williams, *A Textbook of Criminal Law,* 2nd. Edition, London: Stevens & Sons, 1983, p.70 cited in Proshanto K. Mukherjee, "The Penal Law of Ship-Source Pollution: Selected Issues in Perspective", in Tafsir Malick Ndiaye & Rudiger Wolfrum (Eds), *Liber Amicorum Judge Thomas A. Mensah: Law of the Sea, Environmental Law and Settlement of Disputes*", Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston: Martinus Nijhoff September 2007, at p. 482.

[801] Proshanto K. Mukherjee, "Criminalisation and Unfair Treatment: The Seafarer's Perspective", *CMI Yearbook*, 2005-2006 283 at p. 285.

[802] See *R.* v. *City of Sault Saint Marie* [1978] 40 Can Crim. Cas. (2d) 352 (S.C.C.) at pp. 362-363 per Dickson J.

[803] Proshanto K. Mukherjee, "The Penal Law of Ship-Source Pollution" in Tafsir Malick Ndiaye & Rudiger Wolfrum (Eds), *Liber Amicorum Judge Thomas A. Mensah: Law of the Sea, Environmental Law and Settlement of Disputes",* Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston: Martinus Nijhoff, 2007, pp. 463 – 496 at pp. 482-483.

and serious act of pollution in the territorial sea",[804] but no sanctions are prescribed; that matter is left to state parties to adopt and enforce through national law.

The same is true of MARPOL which is a typical IMO regulatory convention. It sets out violations but it does not provide for sanctions. The convention prohibits several varieties of acts which cause operational discharges of pollutants into the sea but makes exceptions for "the discharge into the sea of oil or oily mixtures necessary for the purpose of securing the safety of a ship or saving life at sea" and also with respect to "the discharge into the sea of oil or oily mixtures resulting from damage to a ship or its equipment".[805] To be specific, the prohibitions and provisos are set out successively in Regulations 9, 10 and 11. Regulation 9 of Annex I sets out various prohibitions and controls in relation to the discharge of oil and Regulation 10 prescribes methods for the prevention of oil pollution from ships in special areas. Regulation 11 then provides exceptions as follows:

> Regulations 9 and 10 of this Annex shall not apply to:
>
> (a) …
>
> (b) The discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:
>
> > (i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge; and
> >
> > (ii) except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result.

What emerges from an examination of the detailed wording of the above-noted provisions is that the prohibitions do not apply in the instances mentioned provided reasonable preventative precautions have been taken. However, if there was intent or recklessness and knowledge on the part of the master, the proviso would not apply. This formulation of the provision is typical of a half-way house offence in domestic law. The convention provision gives a clear indication of how the prohibition and proviso should be characterized as offences in domestic legislation giving effect to the convention.[806]

---

[804] Article 230, paragraph 2 of UNCLOS.

[805] Regulation 11 (a)(b) of Annex I of MARPOL.

[806] Proshanto K. Mukherjee, "The Penal Law of Ship-Source Pollution" in Tafsir Malick Ndiaye & Rudiger Wolfrum (Eds), *Liber Amicorum Judge Thomas A. Mensah: Law of the Sea,*

In the opinion of the present author, so long as the offence committed is one that falls within the lower threshold, namely, the proviso, responder immunity should apply. If the offence committed is a criminal offence, that is, consistent with the exception, then no responder immunity should be granted.

Furthermore, there is nothing to say that the salvor as a responder will enjoy immunity from any form of penal liability under the domestic law of a state, be it strict liability or otherwise; and whether based on an international convention or is simply home-grown domestic law such as in the United States without the involvement of any international convention. In respect of the OPRC 90 Convention,[807] for example, there are certain requirements relevant to salvors. In Article 6, the heading of which is "national and regional systems for preparedness and response", paragraph (2)(a) requires each state party to establish "pre-positioned oil spill combating equipment" in co-operation with "relevant entities". Such "relevant entities" could well include salvors. In sub-paragraphs (b) and (c), there is mention of exercises for oil pollution response organizations and training of relevant personnel as well as plans and communication capabilities for responding to oil pollution incidents. Paragraph (3)(b) requires parties to provide information to the IMO "concerning, *inter alia*, pollution response equipment and expertise in disciplines related to oil pollution response and marine salvage". Needless to say, such provisions would attract certain prescribed duties and obligations on the part of salvors as prescribed by relevant government authorities.

It is to be noted that the OPRC 1990 Convention is typically not a self-executing convention which means that the prescriptions of the convention are directed to the state party who is then responsible for practical implementation of the requirements through domestic legislation directed to relevant entities.[808] The upshot is that through domestic legislation, certain regulatory measures may be imposed on salvors, and non-compliance may lead to some sort of regulatory sanction. In the opinion of this author, even if immunity cannot be justifiably given in such instances, the nature of the offence if it is properly characterized, should only be at the lowest threshold of a minor strict liability or perhaps at the level of a half-way house offence.

As discussed in detail earlier in this chapter, MARPOL is the principal regulatory convention regarding ship-source pollution and state parties are bound to give effect to its provisions including those that provide for immunity under Regulation 11 of Annex I, if damage to the ship in question or its equipment is found to be the cause

---

Environmental Law and Settlement of Disputes", Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston: Martinus Nijhoff September 2007, at pp. 482-483.

[807] *U.N.T.S.* Vol.1891, No. 32194.

[808] Proshanto K. Mukherjee, *Maritime Legislation,* Malmo: WMU Publications, 2002 at pp.126-128.

of the discharge of oil into the sea, provided reasonable precautions were taken. This provision provides some respite to salvors engaged in operations involving environmental protection services from regulatory penal liability. The application of Regulation 11(b)(ii) of Annex I may, however, lead to criminal (as distinguished from regulatory) liability in domestic law, but it applies only to the master of the ship, not to a responder such as a salvor.

11.3.4. Criminal Liability and Criminalization

Several commentators and concerned individuals have referred to criminal liability in the context of responder immunity as a result of strict criminal liability being increasingly imposed on any polluter including a salvor or any other responder.[809] Indeed, one is the opposite of the other which is why it has been said "it would seem no more than reasonable that (salvors) should enjoy the protection of responder immunity from …criminal liability".[810] Indeed, in relation to United States legislation, it has been said that even if the responder is not grossly negligent or engaged in willful misconduct, or there was absolutely no fault on his part whatsoever, he might still be criminally liable.[811] In the latter case, that is, without fault, it would be strict criminal liability.

Section 85 of the UK Water Resources Act 1991 imposes strict liability regardless of negligence, on anyone who causes or contributes to pollution in the rivers, estuaries or coastal waters of the United Kingdom. The sanction for committing such an offence is an unlimited fine and up to two years of imprisonment. Not even a government authority is immune to this statutory provision under which in connection with the grounding of the *Sea Empress* in Milford Haven in 1996, the Milford Haven Harbour Authority was prosecuted. It was a grim reminder to the salvage community that there was no responder immunity for them in respect of criminal liability under the jurisdiction of the United Kingdom. Apparently, the Environmental Agency of the government has expressed the view that salvors should have potential criminal liability even though they can be excused if they cause pollution deliberately in order to avoid greater environmental damage, or to save life or follow instructions of the authority.[812]

---

[809] Archie Bishop, "Salvors – The Need for Responder Immunity and Places of Refuge", Lloyd's List events, April 2002, at pp.1-2.

[810] Jim Shirley, "A Primer on Responder Immunity", *supra note* 720.

[811] *Ibid.*

[812] See Archie Bishop, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): *Liability Regimes in Contemporary Maritime Law*. London: Informa, 2007, pp. 99-105, at pp.101-102.

Apart from criminal liability, there is the issue of criminalization, which, although closely related to criminal liability is, from a legal viewpoint, a separate phenomenon. Criminalization in reference to a person means turning someone into a criminal by making his activity illegal.[813] Whereas criminality is criminal behavior leading to criminal liability that has already been established, criminalization by contrast, consists of two strands. One is to make an act a criminal offence which either did not exist or was hitherto not considered a criminal act. In this instance, one would refer to the criminalization of a particular act. The other strand refers to the criminalization of an individual. What this means is that a person is deemed to be a criminal if he commits a certain act which has been characterized as a criminal act even though that was not the case hitherto.[814] It is important in this context to observe that criminalization of individuals has much to do with the so-called flourishing blame culture which is rampant in maritime matters throughout the world.[815]

Another phenomenon with criminalization is scapegoating; in other words, pinning liability on someone for the fault of others.[816] One commentator has referred to "the growing iceberg of criminalization".[817] A brilliant example of criminalization in this respect was the case of the *Tasman Spirit* grounding which occurred in July 2003 in the entrance channel to Karachi Harbour. Seven crew members and the salvage master who had been engaged by the owners to carry out salvage of the ship and the cargo were detained without any charges for 9 months. They came to be known as the "Karachi Eight".[818] Eventually they were charged with conspiring to ground the tanker with criminal intent to cause pollution and injury but the charges were dropped after compensation agreements were negotiated. Needless to say, the crew and the salvage master were made scapegoats. The President of the ISU made the

---

[813] Judy Pearsall (Ed), *The New Oxford Dictionary of English*, Oxford: Oxford University Press, 1998, at 2001.

[814] Glanville Williams, *Textbook of Criminal Law*, 2nd Edition, London: Stevens & Sons, 1983; Proshanto K. Mukherjee, "The Penal Law of Ship-Source Pollution" in Tafsir Malick Ndiaye & Rudiger Wolfrum (Eds), *Liber Amicorum Judge Thomas A. Mensah: Law of the Sea, Environmental Law and Settlement of Disputes",* Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston: Martinus Nijhoff September 2007, pp. 463 - 496; See also Proshanto K. Mukherjee, "Criminalization and Unfair Treatment: The Seafarer's Perspective", *CMI Yearbook*, 2005-2006, at pp.283-284.

[815] Birgitta Hed, "Criminalization of Seafarers", *The Swedish Club Letter*, No.1, May 2005, at p.12.

[816] See Archie Bishop, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): *Liability Regimes in Contemporary Maritime Law*. London: Informa, 2007, pp. 99-105, at p.101.

[817] Statement attributed to Anders Arfelt of the Baltic International Maritime Council (BIMCO) cited in Joseph Collum, "Salvage: Making a Bad Situation Worse", The Maritime Executive, available at http://www.maritime-executive.com/magazine/global-salvage-review.

[818] "Getting the Karachi Eight home", Lloyd's List, 10 June 2004 (No.58676), at p. 5.

comment that "criminalization feeds a blame culture more interested in scapegoats than prevention" and "governments may well pay a stern price for fueling the process of criminalization and so creating a climate of fear".[819]

One commentator has stated that there are two aspects to criminalization; namely, the absence of immunity for responders and the tendency of government authorities to detain and imprison "scapegoats" as in the *Tasman Spirit* case.[820] In September 2006, the ISU adopted a resolution stating that it will oppose providing salvage services in any jurisdiction where salvors are unjustly detained.[821] The same commentator has remarked that criminalization simply fosters a blame culture and some governments unfortunately use it like a "blunt instrument" against those (salvors) who are in the best position to prevent pollution.[822] Scapegoating is not just a factor in salvage cases; the master of the *Prestige* which was a major pollution case occurring in November 2002 was also scapegoated for the faults of others. He remained on board for several days after ordering his crew to abandon ship in order to assist the salvors and was then held in prison for three months pending payment of bail in the amount of three million euros. He was not allowed to leave Spain to visit his home country Greece for three years.[823]

The problem of criminalization did not escape the notice of the then IMO Secretary-General Efthymios Mitropoulos who remarked that "Criminalization may end up depriving us of the services of those individuals or agencies who may play an instrumental role in preventing accidents and, once they do happen, in mitigating their impact on human life and the environment".[824]

Notably, regardless of all the above-mentioned adverse consequences, criminalization of salvors is inherently in conflict with the duty to exercise "due care" under the Salvage Convention and to use their "best endeavours" under LOF

---

[819] Hans van Rooij, "Governments hold the key to criminalization problem", available at the website of ISU at http://www.marine-salvage.com/media_information/articles/criminalisation.htm.

[820] Roger Evans, "Pollution from Ships' Responder Immunity", The Nautical Institute, Southampton, 2007 at pp. 4-5, available at http://www.nautinstlondon.co.uk/nautinstlondon/wp-content/uploads/2012/04/Roger-Evans-Paper-Responder-Immunity.pdf.

[821] "Salvors pull together over oil spills and criminalization of seafarers", Lloyd's List, 23 September 2004 (No.58751), at p. 3.

[822] Roger Evans, "Pollution from Ships Responder Immunity", The Nautical Institute, Southampton, 2007 at pp. 4-5, available at http://www.nautinstlondon.co.uk/nautinstlondon/wp-content/uploads/2012/04/Roger-Evans-Paper-Responder-Immunity.pdf.

[823] See Archie Bishop, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): *Liability Regimes in Contemporary Maritime Law*. London: Informa, pp. 99-105, at p. 101.

[824] Cited in Hans van Rooij, "Governments hold the key to criminalization problem", available at the website of ISU at http://www.marine-salvage.com/media_information/articles/criminalisation.htm.

to contain environmental damage in carrying out a salvage operation, leaving salvors in a dilemma. This will fail to serve the interests of the whole maritime community and the general public.

As the then President of the ISU commented on criminalization of salvors, "[J]ust one prosecution of a salvor 'guilty' only of using his best endeavours would damage the casualty salvage service provided at a global level".[825]

11.4. Responder Immunity as An Incentive for Salvors

After examining the concept of salvorial negligence in the previous chapter and that of responder immunity in the foregoing text of this chapter, it is considered expedient here to connect the two concepts and discuss their implications in the context of the salvor's civil and criminal liability for marine pollution as a risk that salvors have to face in relation to the provision of salvage and environmental protection services. As a preliminary point, it is worth noting that whereas the notion of salvorial negligence applies across the board with regard to any kind of salvage services, with or without a pollution factor, responder immunity as engendered and developed mainly through United States law and legislation, only pertains to oil pollution.

It is apparent that the long-established law does not grant any immunity for gross negligence and willful misconduct on the part of salvors, and the salvage industry accepts it. Salvors are concerned with civil and criminal liability for ordinary negligence or negligence *simpliciter*, which involves the issue of responder immunity. Salvors as rescuers operate in dangerous emergency situations and are expected to make quick decisions. Unintentional and occasional mistakes are quite possible and understandable.[826] However, the sensitivity of environmental pollution has led to the imposition of negligence liability or even strict liability especially in criminal law on any polluters including salvors and other rescuers. Hence, there is little room for responder immunity.

Regarding civil liability for salvorial negligence, even though salvors do have immunity from liability to pay compensation for pollution from oil and other substances in certain domestic legislation such as that of the United States and the United Kingdom, in the international arena, the CLC and the HNS Convention do not provide any immunity but only limited protection by channeling all third party claims through shipowners who are then entitled to take recourse action against

[825] See Archie Bishop, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): *Liability Regimes in Contemporary Maritime Law.* London: Informa, pp. 99-105, at p. 104.

[826] *Ibid*. at p. 103.

salvors for negligence under a contract or the Salvage Convention. The Bunkers Convention has even excluded that limited protection.

On the other hand, criminal liability which is governed by domestic law requires *mens rea*. However, in the context of ship-source pollution, the trend of imposition of strict criminal liability has rendered any polluter including salvors liable in the absence of any fault or negligence *a fortiori*. Immunity from criminal liability and avoidance of criminalization of responders seems less promising against the background of an increasing blame culture in the shipping industry. It is therefore likely that salvors and other rescuers will be discouraged from performing their services for reasons of self-protection. That is the last thing the maritime community would like to confront.

An important point to note in this context is that the Oil Pollution Preparedness, Response and Cooperation (OPRC) Convention, 1990[827] in its Resolution 8 also refers to the sufficiency of salvage capacity on a global scale, and recognizes the need for salvage expertise and requisite experience for responding to marine pollution casualties, and for appreciating and rewarding salvors.[828]

Even though the courts in the *Macondo* and *Amoco Cadiz* cases finally dismissed the claims against salvors who responded to provide environmental protection services, protracted litigation involving time and costs has attracted negative reaction from the salvage community. In this regard, the following comments of Brice are noteworthy:

> If a legal regime was such that it imposed upon a would-be salvor financial limitations or conditions which he found unduly onerous or otherwise unacceptable, then the services of such a salvor would not be offered at all so that those most interested in achieving protection of threatened property would probably achieve none. Further, an organization having particular skills in giving scientific or technical advice, should an emergency occur, may be faced with the prospects of large claims and protracted litigation. It is therefore important to seek to create a legal environmental in which those with the proper skills and equipment may be encouraged to take prompt and effective action"[829]

As a final footnote to this chapter, this author submits that the question that stands as the central theme of this thesis is not one that can be easily resolved, that is, by wholly agreeing with one or the other side of the debate. In other words, the answer to the question whether the plea of the international salvage community for a stand-alone regime of remuneration for providing environmental protection services to a

[827] 1891 *UNTS* 51; 30 *ILM* 733 (1990).

[828] See Brice, at para. 6-86.

[829] Brice, at para. 6-59

stricken ship should be answered in the affirmative or whether the *status quo*, which in effect is the position taken by the shipowners and their P&I Clubs should prevail, must lie in a zone of compromise. It would be naive to view this as a "zero sum" game with a winner and a loser. What is best for the shipping industry as a whole, given the reality of the maritime menace of pollution and the need for a cadre of professionals to combat it effectively, should be the objective we must seek. If a regime of responder immunity to relieve salvors of liability can be agreed internationally, it may serve as a viable alternative to satisfy the salvage community and prompt it to withdraw its plea for a regime independent of the current arrangements of salvage reward and special compensation or SCOPIC. This author, in unison with Professor Mandaraka-Sheppard, submits that the IMO should consider adopting a robust approach to the issue of responder immunity to protect responders (such as salvors) who are usually the first ones to be on site when a maritime casualty happens.[830] It is conceded that the viability of this proposition is fraught with speculation and uncertainty but every effort should be expended to make it happen.

[830] Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Inform Law from Routledge, 2013, at p.571

Part V
- Conclusion

12. Summary and Conclusions

12.1. Preliminaries

It should be abundantly clear and apparent from the foregoing eleven chapters reflecting the research findings that the central theme of the inquiry is the phenomenon of "environmental salvage", re-articulated in this thesis as "environmental protection services" provided by salvors. While it is recognized that these services are primarily provided by the salvage community, arguably, the term "environmental salvage" is a misnomer given that traditionally salvage only involved saving of property. Environmental implications were absent in the days of sailing ships. In the contemporary maritime milieu, salvors have been incessantly demanding that they should be paid a separate reward for carrying out services pertaining to environmental protection. This proposition has been rejected by the rest of the shipping community time and again.

In this thesis, the author proposes an alternative solution. Indeed, that is the envisaged objective flowing from the stated purposes and the research questions set out in the introductory chapter. In this final chapter, a gist of the thesis is presented in summary form reflecting the research findings leading to conclusions explaining the proposed alternative to deal with the dilemma faced by the shipping industry at large; namely the two diametrically opposite positions adopted by the salvage and property insurance industry on the one hand and shipowners and their liability insurers on the other.

12.2. Summary of Thesis Content

In the introductory chapter, first the background to the problem forming the subject matter of the research inquiry is presented against which the problem is identified, the purpose of the project is stated and research questions are formulated. The stage being thus set and the subject of inquiry being essentially legal in scope and content, the next step involves a clear explanation of the legal theory behind the phenomenon of marine salvage and the private law of ship-source pollution. The methodological approach adopted in the research in light of the stated legal theory is presented

elaborating the dogmatic or doctrinal approach in combination with the historical evolution of the law in the respective fields. They are discussed in contextual detail in the second chapter. All of these matters are preliminary to the substantive inquiry in which the two principal subjects are salvage and pollution.

A relatively thorough discussion of the law of salvage including its roots in Roman law and the absorption of equitable principles in the English legal system is carried out in Chapter 3 of the thesis. Salvage law is described as *sui generis*. The public policy of encouraging the provision of salvage services is embedded in the law through the granting of a liberal reward. To establish a right to salvage, the triumvirate of danger, voluntariness and success has to be met. The ingredient of success is widely expressed as "no cure no pay" in LOF, the cure being ultimate preservation of the property and only maritime property, no other form of property as a subject of salvage to attract a reward.

Further down the road, subsequent to the era of salvage being carried out by seafarers of a ship passing by or being in the vicinity of a stricken ship, salvage operations started to be carried out by professional salvors under contractual arrangements pursuant to standard forms. The most famous of these was, and still is, the LOF. Notable in this context is the fact that in these arrangements, the traditional ingredients of salvage must still be present, without which salvage remuneration would not be payable. The amount of the salvage reward came to be determined by arbitration which is still the case, and which casts salvage outside the realm of pure contract making it *sui generis.* A related phenomenon is "contract salvage" in which the customary ingredients of salvage need not be present thus bearing the hallmarks of a proper contract. Life salvage is another notion unrelated to saving or salving maritime property in the traditional sense but is also a forerunner of what subsequently came to be known as environmental salvage.

In the next chapter, that is chapter 4, the legal regime governing liability and compensation for ship-source pollution damage is dealt with extensively. It is recognized that such liability is based primarily on the tort laws of negligence and/or nuisance exemplified by cases such as the House of Lords' decision in *Southport Corporation* v. *Esso Petroleum*[831] and *The Wagon Mound I and II* cases[832] decided by the Privy Council. The liability is based on proof of fault as in other varieties of torts and damages are payable by the polluter to the victim of pollution. However, following the *Torrey Canyon* oil spill disaster which was unprecedented, the CLC 1969 was adopted which focused on strict liability of the registered owner of the polluting ship and continues to have its own limitation regime which has been periodically uplifted. Notably, following the adoption of the CLC, at the diplomatic

[831] [1956] A.C. 218 (HL).

[832] [1961] 1 Lloyd's Rep 1 (PC).

conference and thereafter, shipowners and their insurers raised the question of whether the owners of the pollutant cargo which caused environmental pollution should bear some responsibility for pollution damage to victims of such pollution. Concerns in this regard led to the adoption of the Fund Convention 1971 together with the creation of IOPC Fund. The Fund, which has its own limits of liability over and above that of the CLC, is available to meet pollution claims of victims who fail to be compensated under the CLC limits or otherwise fall outside the scope of application of that convention. The IOPC Fund is financed through levies imposed on imports of oil received by states parties to the Fund Convention thus covering the widest possible range of countries. The actual payments are made by the oil companies importing the oil commodity through the country of importation. The limits of liability of the CLC combined with the Fund Convention, the latter consisting of an optional Supplementary Fund, provide for an integrated system of three tiers of compensation which adds up to some 1.2 billion SDR approximating USD 1.7 billion in present terms.

In this chapter, other related vessel-source pollution issues are dealt with including questions of *locus standi* for bringing actions by reference to relevant case law. This brings into consideration, the status of actionability of vessel-source pollution claims and compensability of different varieties of pollution damage including compensation for economic losses which, in the view of the present author, are not adequately addressed in the pollution liability conventions.[833] Decisions relating to admissibility of claims by the IOPC Fund, otherwise referred to as "Fund jurisprudence" and the attitudes of national courts towards them, are discussed in this chapter.[834] What is referred to as "pollution damage" in the conventions and defined in elaborate but somewhat equivocal terms, is descriptive of the notion of compensable damage. Under the conventions, "preventive measures" is also a defined term, costs of which qualifies as "pollution damage", but to what extent it is compensable in real terms is somewhat vague without reference to case law. In this regard it is notable that there are conspicuously important IOPC Fund decisions relating to admissibility of claims by shipowners who have incurred expenses for preventive measures taken by salvors to prevent or mitigate pollution damage. The Fund has devised the notions of "primary purpose" and "dual purpose" in rationalizing its decisions on whether such claims are acceptable by it for payment of compensation.

---

[833] *Landcatch Ltd*. v. *Braer Corporation and Others* [1998] 2 Lloyd's Rep. 552 and *Landcatch Ltd.* v. *International Oil Pollution Compensation Funds*, [1999] 2 Lloyds Rep. 316; *P&O Ferries* v. *Braer Corporation and Another* [1999] 2 Lloyd's Rep 535 (Scottish Court of Session, Outer House).

[834] The *Rio Orinoco* case. See FUND/EXC. 28/9, 8 October, 1991, §3.3.2; *Agip Abruzzo* FUND/EXC 30/5, 17 December 1991, § 4.2.3.

Another issue that arises in this context pertains to who all might be beneficiaries of the salvor's efforts for provision of environmental services. It would seem that the owner, custodian or trustee of the environment in question is one beneficiary who has much to gain from the salvor's services in this respect. Another is the shipowner who may be protected from pollution liability as a result of the salvor's intervention. At any rate, there is much to be gleaned from the discussion of these issues which have not hitherto been adequately explored in scholarly writings.

In Chapter 5, the thesis highlights the environmental dimension of salvage, and traces the development of the law in this field through convention and non-convention instruments.

First, in the interests of global uniformity, through the instigation of the CMI, a Salvage Convention was adopted in 1910 which governed salvage operations internationally well until the advent of ship-source marine pollution starting with the infamous *Torrey Canyon* incident. Governmental intervention, refusal of refuge and the harshness of the "no cure-no pay" principle drove salvors away from leaking tankers. The notion of "enhanced award" embedded in the traditional salvage law turned out to be inadequate to address the issue. Two simultaneous developments took place, namely, the institution of the "safety net" in the LOF and the adoption by IMO of a new Salvage Convention in 1989. Article 13 of the Convention deals with salvage of maritime property incorporating the elements of customary salvage law including the requirement of success as a pre-condition for being remunerated.

In all of this, remuneration for saving or protecting the environment and the attendant notion of saving the shipowner from pollution liability entered the scene much later. Indeed, this notion came on the heels of what is known as liability salvage, that is, salvage services oriented towards relieving a shipowner from liability to which he would have been otherwise exposed, had it not been for the intervention of the salvor. Such liability could have been based on tort or contract or both.

The complexity of Article 14, its correlation with Article 13 and difficulties resulting from differences of opinion with its interpretation came into the forefront with the case of *The Nagasaki Spirt* discussed in detail in chapter 6 of the thesis. In this case, the House of Lords opined that the words "fair rate" in relation to equipment and personnel ingrained in Article 14 did not include a profit element. The *Nagasaki Spirit* decision left shipowners, insurers and salvors frustrated with the special compensation regime albeit in different ways, leading to the search for a solution circumventing the bounds of convention and case law. Eventually, SCOPIC was invented as an optional annex to LOF pursuant to which the claimable expenses are according to a market-inspired tariff. SCOPIC, which has been subjected to periodic improvements, seems to be standing on relatively firm ground as a contractual regime. It is dealt with in adequate detail in chapter 7 of the thesis.

Chapter 8 examines the continued dissatisfaction of the salvage industry which views both Article 14 of the Salvage Convention tempered by the *The Nagasaki Spirit* decision as well as SCOPIC as inadequate in that they only provide for a reimbursement of salvage expenses. A law reform proposal manifested in a position paper of the International Salvage Union (ISU) proposing amendments to Articles 13 and 14 of the Salvage Convention 1989 was submitted to the international shipping community through the auspices of the CMI. What the salvage industry is looking for is an independent free-standing regime providing a separate award to salvors for environmental protection services to be known as an "environmental award". Under this proposal, the environmental award would not be limited to reimbursement of salvors' expenses comprising "out-of-pocket expenses" and a "fair rate for equipment and personnel" as in the special compensation regime set out in the existing Article 14. Furthermore, actual and successful prevention or mitigation of damage to the environment would no longer be a condition for a discretionary uplift of salvors' expenses, but only a factor to be taken account of by the tribunal when quantifying the environmental award. If this proposal were to materialize, it would represent a radical change in the treatment of rewards payable to salvors. But it did not; the ISU proposal was vehemently rejected at the 2012 Beijing Conference of the CMI.

This chapter later stands for the author's proposition that the expression "environmental salvage" is a misnomer, and in its place the term "environmental protection services" is proposed to describe services provided by salvors to prevent or mitigate damage to the environment in the course of salvage operations. The author finds support for this proposition in the leading text *Kennedy & Rose on the Maritime Law of Salvage,* in which the term "environmental services" is used.

A clear understanding of vessel-source pollution law which spans across the spectrum of concern for environmental harmony regardless of pollution sources is intimately connected to traditional and modern concepts of salvage and the legal theories of pollution prevention and mitigation, and remedies for pollution victims. However, while salvage and pollution are the two foundational pillars of this thesis, and whereas the two phenomena are intimately interconnected, the author espouses the proposition that environmental protection services are in essence different from salvage services even if both are provided by salvors. One has to do with saving or salving property from loss or destruction whereas the other has a three-fold objective, that is, first protecting and preserving the marine environment from pollution, second, in the process of mitigating the spread of pollution from ships, protecting potential victims from suffering pollution damage and third, protecting the shipowner from liability for such damage. This thought and proposition is projected in chapter 5 of the thesis.

However, this is not merely a suggestion for a name change but is accompanied by a critical analysis of the substantive nature of the phenomenon which warrants an appropriate nomenclature and clarity of explanation of what it purports to signify, that is, that environmental protection services provided by salvors is not salvage. This chapter is the very core of the thesis as it reveals not only a semantic anomaly but harks back to the traditional and customary concept of salvage pointing out its lack of compatibility with the perception of the concept of environmental protection services.

The key question addressed here is whether environmental protection services constitutes salvage at all given the well-established meaning of that term which traditionally has referred only to saving and preservation of property. Indeed, the expression "environmental salvage", in this author's opinion, poses an even more significant definitional dilemma. The author therefore considers it as an original contribution of the research carried out and the findings put into this thesis.

Chapter 9 concerns indemnification of charges incurred by ship owners in respect of environmental protection services. This begs the question whether these charges are indemnifiable under marine insurance law in the same manner as salvage charges given that salvage and environmental protection services are intertwined. The pecuniary obligation thrust upon the assured shipowner or cargo owner by contract or by operation of law which he must discharge, is referred to as "salvage charge" in section 65(2) of the MIA. Salvage charges would be recoverable by the assured shipowner only if recoverable under maritime law, that is, the customary law of salvage. The point is made in this context that in tandem with the advents of LOF 1980 and the 1989 Salvage Convention, two "funding agreements" were reached between property underwriters and liability insurers in 1980 and 1990. Under these agreements, as it stands now, salvage rewards are recoverable by ship, cargo and freight insurers under the existing forms of policies, and charges incurred under Article 14 of the Salvage Convention, 1989 and SCOPIC payments are to be paid by the P&I Clubs. It is the insurance industry which decides the fate of environmental protection services provided by salvors. The divided positions of property insurers and liability insurers towards the proposal of salvors are therefore presented in detail. Even though property underwriters support salvors, the P&I Clubs who actually bear the financial burden firmly reject it. The key factor to achieve a change in the law regarding remuneration for environmental protection services is to obtain the support of the P&I community.

Chapter 10, looks into the sensitive issue of a salvor's liability for negligence in performing his services. It is as much a public policy issue as it is a legal and philosophical one which has been debated historically predominantly through English case law. In a previous era, it was thought that holding a salvor liable, unless his conduct fell within the purview of gross negligence or willful misconduct, would

be contrary to the entrenched public policy of encouraging salvors to undertake salvage operations fraught with risks and danger in the interest of sustaining the shipping industry. In modern times the debate was put to rest by the House of Lords in the famous *Tojo Maru* case in which it was held that there was little or no justification for exonerating a salvor from liability even for negligence *simpliciter*. At the level of the Court of Appeal, Lord Denning M.R. put forward the "shield" argument postulating that the maximum liability should be deprivation of the whole award, but the House of Lords adopted the "sword" approach allowing for the plaintiff to counterclaim which meant that a salvor could well go out of pocket scrambling below the zero-award threshold. Furthermore, the court held in that case that the salvor could not limit his liability.

The pronouncement of the House of Lords in *The Tojo Maru*, unsurprisingly, did not bode well with the salvage industry but little was the industry able to achieve by way of opposing it except that a provision in the subsequent LLMC 1976 Convention allows salvors to limit liability on the basis of 1,500 limitation tons. The conclusion by the court that a salvor can be held liable for negligence regardless of the public policy argument is partly manifested through a combination of Articles 8(1)(a) and (b) and 18 of the Salvage Convention, 1989, making the stated law universal in scope and application beyond the perimeters of English jurisprudence.

A closely related issue allied to salvorial negligence is the question of responder immunity. This is addressed in quite a comprehensive fashion in Chapter 11 of the thesis. Ordinarily, salvors run the risks of loss of financial benefits due to the harshness of the "no cure-no pay" rule. They also run the added risks of damage to their vessels and equipment, and personal injuries. In ship-source pollution instances, when they provide environmental services, as responders, the risks are even higher if they are adjudged to be negligent in either civil or criminal terms, or both. It is recognized that responder immunity is largely an American concept flowing from statutory provisions. This chapter explores whether there is equivalency in international law or a corresponding principle in other common law and civil law regimes. It appears that there is no responder immunity, but limited protection against suit from third parties, in the CLC and HNS conventions. Even that limited protection is absent in the Bunkers Convention. In contrast, the domestic legislation of the United States and United Kingdom provides proper immunity for responders, as imperfect as it may be. In addition to the absence of immunity for civil liability, there is a tendency to criminalize responders including salvors. Finally, it is proposed that responder immunity can be used as a compromise to persuade the salvage industry to abandon its demand for a standalone environmental award.

12.3. Final Conclusions

ISU's proposal for an independent "environmental award", claiming that the existing salvage law does not provide adequate incentives to them for their environmental protection services, has inspired this author to carry out this research. After the fundamental setting in Parts I and II, Part III naturally concentrates on the remuneration for provision of environmental protection services. Such remuneration available under the existing salvage law and the proposed regime are summarized in the following table. The table is not intended to present the comprehensive depiction of the legal regimes but to function as a tool to compare the remunerations and to understand the differences between them.

Table 1.

Remuneration for environmental protection services

Award	Right to an award	Amount	Limit of Amount	Responsible Party
Article 13 Salvage Reward	When salvage operations are successful, yielding a "useful result"	Assessed usually by arbitrators, taking into account ten criteria including "the skill and efforts of the salvors in preventing or minimizing damage to the environment".	The salved value of property.	Shipowners and cargo oweners *pro rata* to salved value of property
Article 14 Special Compensation	When there is a threatened damage to the environment, and Art 13 salvage reward is less than special compensation assessed.	Salvor's expenses (out-of-pocket expenses plus a "fair rate") Plus A discretionary increase of up to 30% (exceptionally, up to 100%).	Twice the salvor's expenses	Shipowners
SCOPIC Remuneration	When SCOPIC is invoked by the salvor.	Tariff rates Plus Out-of-pocket expenses Plus A 25% bonus		Shipowners
Proposed "Environmental Award"	When the salvor has carried out salvage operations in respect of a vessel threatening damage to the environment	Assessed usually by arbitrators, taking into account three criteria including actual prevention or minimization of damage to the environment and the resultant benefit conferred	A "to-be-decided" multiplier of Special Drawing Rights, according to the gross tonnage of the vessel in question	Shipowners

As can be seen, the existing salvage law does provide separate financial incentives to salvors for their environmental protection services in the forms of Article 14 special compensation under the Convention or SCOPIC remuneration if applicable. However, the salvage community remains not fully satisfied with the present

arrangements and is claiming a separate "environmental award" to be decided at arbitrators' discretion, for providing environmental protection services to ships that threaten the environment.

In the view of the present author, environmental protection services provided by salvors during a salvage operation is an independent service parallel to, rather than a part of, salvage. No doubt, in most cases, the need for environmental protection services arises in the course of a salvage operation and are intertwined, but the aims of the two services, both provided by salvors, are distinctively different. The aim of salvage services is to save property whereas the aim of environmental services is to protect the environment even if in most cases that service happens to be incidental to saving property. Indeed, measures taken by salvors frequently serve the purpose of salvage and environmental services simultaneously, such as removal of bunker oil which is often the first responsive action in a pollution incident. Probably for that reason, environmental protection services provided by salvors are loosely referred to as "environmental salvage". Notably, CLC 1992 does not provide a definition of "salvage operations" for which one must resort to the Salvage Convention, 1989. But in that Convention, there is no reference to any environmental implication in the definition of "salvage operation". Article 1 of the Salvage Convention defines "salvage operation" as "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever" which only involves preservation of maritime property; not protection of the marine environment. By contrast, in the context of environmental protection services, "salvage operations" and "preventive measures" are intertwined under the CLC. However, an operation involving an act of saving ship or cargo that has the effect of preserving property and protecting the environment, such as pumping oil from a sunken or stranded ship, must pass the so-called "primary purpose test" or "dual purpose test" as set out by the IOPC Fund before it can qualify as "preventive measures".[835] Perhaps a division between salvage and environmental protection services could be made and their relative proportionality determined, which is the practice of the IOPC Fund as elaborated in this thesis. Claims for compensation for taking preventive measures should be assessed on the basis of cost with a reasonable element of profit allowed and not on the basis of salvage awards. [836] The IOPC Fund thus treats it as a separate service which falls under the definition of "preventive measures" under the CLC and Fund Convention.

It is submitted that environmental protection services provided by salvors comprise an independent service among other types of services such as towage and wreck

[835] *Rio Orinoco* case. See FUND/EXC. 28/9, 8 October, 1991, §3.3.2; Agip Abruzzo FUND/EXC 30/5, 17 December 1991, § 4.2.3.

[836] IOPC Fund, Guidelines for presenting claims for clean-up and preventive measures 2018 Edition, para. 5.27

removal. The author chooses to use the expression "environmental protection services" which aptly describes the measures taken by a salvor to prevent or mitigate damage to the environment. Such services, even if they flow from the same action such as removal of the polluting ship and cargo, are separable as demonstrated by the practice of the IOPC Fund. When dealing with salvage operations involving preventive measures, the IOPC Fund has decided that the costs of those operations is admissible only if the primary purpose of the operations is to prevent pollution. Where it is impossible to establish with any certainty what the primary purpose is, and where the operation had the dual purpose of preventing pollution damage and saving property, the costs of the operation are apportioned between preventive measures and salvage. The two kinds of services have already been treated and even quantified independently in practice for a long time by the IOPC Fund. These services should be treated differently from salvage but not necessarily in the form of a discretionary environmental award as proposed by the salvage industry. Rather, consideration may be given to the formulation of a contractual instrument like SCOPIC but unattached to traditional salvage as SCOPIC is, by it being a part of the LOF, as an optional supplement.

The function of the proposed term "environmental protection services" is to provide a clarified explanation of the existing salvage law and the proposed changes advocated by the salvors. It is submitted that the current salvage law governs two independent services both provided by salvors, namely, salvage and environmental protection services. Different treatment has been given to the two services by providing for different payment structures. The ISU proposal serves to reinforce the distinction between those two services. However, it is contended that neither special compensation nor SCOPIC provides remuneration but only compensation for expenses incurred. In the view of this author, the existing salvage law does provide incentives to salvors for their environmental protection services, especially SCOPIC remuneration in which the element of profit is allowed in the tariff rates and for which a solid security system and efficient assessment is provided. The ISU proposal relies on the inadequacy of payments for environmental protection services. A conclusion on this matter is beyond the scope of this thesis and there is no intention on the part of the author to probe into the economic question.

It is also submitted that the establishment of an independent and discretionary "environmental award" for provision of environmental protection services is in essence a revival of the concept of liability salvage which has already been rejected. At any rate, the proposal is not considered to be workable simply because of the strong objection voiced by the P&I community. Be that as it may, as one commentator has remarked, by not paying heed to the claims of salvors, "the danger is that if you drive salvors out of business, potentially you will eventually have

another *Amoco Cadiz* incident" [837] where salvors were reluctant to provide environmental protection services and pollution raged. This author therefore proposes to seek an alternative solution through the device of responder immunity.

When a salvor faces a maritime casualty, as a commercial entity he is exposed to risks which deter him, in two respects, from providing environmental protection services. One is the arguable risk of inadequate remuneration and the other is the risk of liability. Under the current legal framework, salvors have the duty to protect the environment but in their view, they receive only reimbursement as "bare minimum" for personnel and equipment used, rather than adequate remuneration for their environmental protection services. In addition, there is the major risk of suffering liability for pollution damage occurring during the operation. Increase of remuneration and reduction of potential liability for provision of environmental protection services both serve as incentives or encouragement for salvors. The latter phenomenon in the form of responder immunity may well serve as the catalyst for the resolution of the current deadlock engendered by the opposing views of the two camps.

Responder immunity refers to immunity from civil and penal liability. Immunity, in its legal sense, means exemption from legal proceedings or liability. To be more specific, it connotes release or exemption from liability in a given situation in accordance with a given law, notably of a statutory kind. Under the statutory law of the United States, a salvor is not liable for causing pollution damage to the salvee's ship or cargo unless there is gross negligence or willful misconduct on his part. Notably, both these terms are typically of common law vintage. It is clear from the United States statute law that "exemption from liability" operates in relation to "a discharge or a substantial threat of oil or a hazardous substance, and is thus applicable to those involved in spill cleanup operations". This is relevant to other species of responders, such as clean-up contractors, who are not necessarily professional salvors and who do not operate under the principles of salvage law and practice.

It may be contended that the channeling provisions in the CLC and HNS Convention provide for responder immunity, but as submitted by this author, in actuality, they are not. Unfortunately for the salvor, even such a channeling provision, as imperfect as it may be, is absent in the Bunkers Convention. Such provisions, it seems, were deliberately deleted from the draft convention to remove protection from third-party claims for those who are protected under the CLC 1992 and HNS Convention. The channeling provisions under the CLC and HNS Convention ostensibly protect salvors from liability for pollution damage caused in providing environmental

[837] Nigel Lowry, "Salvors and Insurers Mull Proposed New LOF Contract", Lloyd's List, 20 September 2018.

protection services. However, the wording "no claim for compensation for pollution damage may be made against" merely affords protection from being directly sued by the victims of pollution damage. It does not prevent claims of the shipowner against the salvor by way of recourse. Hence, the net effect is that there is no real immunity from liability for salvors under CLC 1992 or the HNS Convention where recourse action can be brought by the shipowner against them. In other words, the law through paragraph 4 of Article III of CLC 1992, gives immunity with one hand and takes it away with another through paragraph 5. Thus, in providing environmental services to contain pollution, if a salvage operation causes environmental damage, negligence claims may be instituted by shipowners by way of recourse actions. This defeats the basic purpose of responder immunity and the rationale for allowing recourse action has not been clearly explained by the architects of the international legal framework in this field.

In terms of domestic legislation addressing this matter, the United Kingdom Merchant Shipping Act is exemplary. Section 156 (1) of this Act provides for a "no liability" regime unless damage or cost is caused intentionally or recklessly with knowledge of its consequences. Subsection (2) expressly extends this immunity to persons performing salvage operations carried out with the shipowner's consent or pursuant to instructions given by a competent public authority. As such, the legislation departs from the CLC 1992 by stipulating that no person providing environmental services "shall be liable" for oil pollution. There is no express provision granting right of recourse action to shipowners against responders. Thus, there is responder immunity *stricto sensu* for salvors except that the equivalent of what is notionally gross negligence or willful misconduct will deprive them of such immunity. Undoubtedly, this is the ideal kind of legal protection for salvors providing environmental protection services which, in the opinion of this author, the international conventions should emulate.

While it is widely accepted by practitioners and academics that the channeling provisions in the CLC and the HNS Convention constitute responder immunity, this author submits that it is fallacious and a misconception. The "channeling provisions" in the Conventions are clearly not the equivalent of the responder immunity provisions in the United States and United Kingdom legislation. The channeling provisions in those two conventions involve responders but provide no "immunity" in its true sense. There is no immunity for the salvor in respect of a shipowner's "recourse actions". By contrast, similar in substance to the United Kingdom Merchant Shipping Act, the OPA 90 of the United States provides that a responder "is not liable" for removal costs or damages which result from rendering care, assistance, or advice. As emphatically pointed out above, the UK legislation provides explicitly that no salvor or other responder "shall be liable" for damage or cost unless the services were provided without the shipowner's consent or contrary to instructions given by a competent public authority.

By comparison with the above-noted instances of domestic legislation, clearly the channeling provisions of the conventions do not provide "immunity from liability" with respect to the salvor as a responder to contain pollution damage. If recourse action is actually brought by owners against salvors acting without gross negligence or willful misconduct as environmental service providers, perhaps only then will it be realized how limited the protection afforded to them is, under the CLC and HNS Convention, let alone the Bunkers Convention. Worse still, the limited protection from third-party suit under the conventions can sometimes be circumvented. A salvor could lose his protection if a third-party claimant seeks a remedy outside the convention, when remedies within the convention are exhausted, such as where the limitation fund is depleted. Such eventuality is likely to shake the whole response industry in a negative way.

Salvors have concerns over responder immunity for negligence *simpliciter* because of their vulnerability to liability for pollution damage. As rescuers, they operate in dangerous emergency situations and are expected to make quick decisions. Unintentional and occasional mistakes are quite possible and understandable. In the absence of immunity, the salvor could find himself facing multiple recourse actions in various jurisdictions, resulting in responders including salvors being reluctant or less inclined to take on environmental protection services. This would inevitably be detrimental to the commercial interests of the maritime community.

In consonance with the opinions of others,[838] it would be helpful if the IMO through its relevant conventions adopts a more robust approach to the important issue of responder immunity to protect responders, especially salvors providing environmental protection services, who are usually the first ones to be on site when a maritime casualty occurs. Hence, the establishment of a sound, well-balanced, functional system for the engagement of environmental protection services to combat the threat of environmental damage is indubitably essential.

Flowing from a close examination of the remuneration and liability positions of salvors providing environmental protection services and the concept of responder immunity, it is considered expedient here to connect the two by exploring the possibility of introducing a full-fledged concept of responder immunity into the international ship-source pollution liability and salvage regimes. The question posed is whether such action can serve as a quid pro quo or trade-off for the shipping industry's refusal to entertain the salvage industry's demand for a standalone regime of a separate award for environmental protection services. This author recommends that this line of approach should be seriously considered in reaching the much-needed compromise to bring the current stand-off between the two camps to an end.

[838] See Aleka Mandaraka-Sheppard, *Modern Maritime Law, Volume 2: Managing Risks and Liabilities*, Third Edition, Informa Law from Routledge, 2013, at p.571.

It may be desirable to circumvent the remuneration issue as a direct financial incentive and treat responder immunity as a viable alternative for encouraging salvors to provide environmental protection services. Regardless of the legitimacy of an independent environmental award given the conflicting views towards it, if a functional regime of responder immunity can be agreed internationally, it may well satisfy the salvage community and prompt it to abandon its plea for a regime independent of the current arrangements of salvage reward and special compensation or SCOPIC. In the final analysis and conclusion, a robust regime of responder immunity is what is recommended by the present author as the most viable course of action for reconciliation of the differences between the parties concerned relating to environmental protection services. This course of action would be desirable in the interests of the world maritime community as a whole.

One distinguished author states as follows: "[I]t is claimed that maritime law develops and progresses through maritime disasters which force the international legislator to enact new laws or to amend existing rules to plug loopholes or cure deficiencies in the existing legal regimes."[839] Perhaps the necessity of establishing responder immunity for salvors at an international level can only be perceived if another pollution disaster happens where no environmental protection services are provided by salvors.

[839] Marc A. Huybrechts, "Whatever Happened to European Directive 2005/35/EC? Europe's Ambivalent Approach to the Fight Against Marine Pollution and its Consequences for Seafarers", Chapter 14 in Baris Soyer and Andrew Tettenborn (Eds), *Pollution at Sea: Law and Liability*, Informa: London, 2012, at p.255.

References

Cases

UK cases

Admiralty Commissioners v. Valverda (Owners), [1938] A.C. 173.

Akerblom v. Price, Potter, Walker & Co., (1881), 7 Q.B.D. 129.

Alenquer, The; Rene The [1955] 1 Lloyd's Rep 101

Barracuda Tanker Corporation and Union Oil Company of California v. United Kingdom of Great Britain and Northern Ireland, Republic of France, and States of Guernsey (The "Torrey Canyon"), [1969] 2 Lloyd's Rep. 591.

Ballantyne v. Mackinnon, [1896] 2 J.B. 455 (C.A.).

Bosworth (No. 1), The [1959] 2 Lloyd's Rep. 511.

Bosworth (No. 2), The [1960] 1 Lloyd's Rep. 173.

Byrne v. Boadle (1863), 159 E.R. 299.

Cape Packet, The (1848), 3 W. Rob. 122

Charlotte, The (1848) 3 Wm Rob. 68; (1848) 166 E.R. 888.

Clifton, The, 3 Hag Ad. 117; 166 E.R. 349.

Cornu v. Blackstone, (1781), 2 Dougl. 641.

Delphinula, The (1947), 80 Ll. L. Rep. 459 (C.A.); (1947), 2 All. E. R. 465

Donaghue v. Stevenson, [1932] A.C. 532.

Eileen Siochu, The (1948), 82 Ll.L.R. 128.

Entick v. Carrington, (1765), 19 State Trials 1029, Common Pleas.

Falcke v. Scottish Imperial Co., (1886), 34 Ch. D. 234.

Five Steel Barges, The (1890), 15 P.D. 142.

Fusilia, The (1865) Brown & Lush 34; (1865) 167 ER 391.

Hartford v. Jones, (1698), 1 Ld. Raym. 393 (91 E.R. 1161).

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465

Grand Union (Shipping), Ltd. v London Steam-Ship Owners' Mutual Insurance Association, Ltd. (The "Bosworth") (No. 3), [1962] 1 Lloyd's Rep. 489.

Gas Float Whitton No. 2, The (1896), P.42; affirmed by (1897), A.C. 337.

Goring, The [1988] 1 Lloyds Rep. 397 (H.L).

Gorliz, The [1917] P. 233.

Helenus and Montagu, The [1982] 2 Lloyd's Rep. 261.

Hudson Light, The [1970] 1 Lloyd's Rep. 188.

Juliana, The (1822), 2 Dods. 504.

Killeena, The (1881) 6 PD 193.

Kidston v. Empire Marine Insurance Co. Ltd., (1866), LR 1 CP 535.

Landcatch Ltd. v. International Oil Pollution Compensation Funds, [1999] 2 Lloyds Rep. 316.

Lomonosoff, The [1921] P. 97.

Leon Blum, The (1915), P. 90

Marina Offshore Pte Ltd v. China Insurance Co (Singapore) Pte Ltd (The Marina Iris) [2006] SGCA 28; [2007] 1 Lloyd's Rep. 66.

Mason v. The Blaireau (1804), 2 Cranch 239.

Manchester Liners Ltd. v. M.V. Scotia Trader, [1971] F.C.R. 14 (FCTD).

Mount Cynthos, The (1937), 58 Ll.L.R. 18.

National Defender, The [1970] 1 Lloyd's Rep. 40.

Neptune, The (1824), 1 Hagg. 227.

Nicholas v. Chapman, (1793), 2 H Bl 254.

Notre Dame De Forviere, The (1923), 14 Ll.L.R. 276

N.V. Bureau Wijsmuller v. "Tojo Maru" (owners), (The Tojo Maru), [1971] 1 Lloyd's Rep. 341.

The North Goodwin No. 16, (1980), 1 Ll.L.R. 71.

The Notre Dame De Forviere (1923), 14 Ll.L.R. 276

Overseas Buyers Ltd. v. Granadex SA, [1980] 2 Lloyd's Rep. 608.

Owners of the Motor Tug Bostonian v Owners of the Gregerso (The "Gregerso"), [1971] 1 Lloyd's Rep. 220.

Owners, Master and Crew of the "Bankstone" v Bluebird (The "Bluebird"), [1971] 1 Lloyd's Rep. 229.

Phantom, The (1886), L.R. 1 A & E.

P&O Ferries v. Braer Corporation and Another, [1999] 2 Lloyd's Rep 535 (Scottish Court of Session, Outer House).

R. v. City of Sault Saint Marie [1978] 40 Can Crim. Cas. (2d) 352 (S.C.C.).

R.J. Tilbury & Sons v. Algrete Shipping Company, [2002] EWHC 1095 (Admiralty).

Rylands v. Fletcher, [1968] L.R.3 (H.L.) 330.

San Demetrio, The (1941), 69 Ll.L.R. 5.

Semco Salvage & Marine Pte Ltd. v Lancer Navigation Co. Ltd. (The "Nagasaki Spirit"), [1995] 2 Lloyd's Rep. 44 (Q.B.).; [1996] 1 Lloyd's Rep. 449 (A.C.).;[1997] 1 Lloyd's Rep. 323 (H.L.).

Skerries Salmon Ltd. v. Braer Corporation, [1999] S.L.T. 1196 (Scottish Court of Session, Outer House).

Sir Henry Constable's case, 5 Coke's Rep Part VI, 106a.

Southport Corporation v. Esso Petroleum Co. Ltd., [1956] A.C. 218 (H.L.).

Sveriges Angfartygs Assurans Forening (The Swedish Club) v. Connect Shipping Inc (MV Renos), [2018] EWCA Civ 230;[2018] 1 Lloyd's Rep 285.

Teh Hu, The [1970] P. 106 at p. 124.

Trico Marine Operators Inc. v. Dow Chemical Co. 809 F. Supp. 440, 1993 A.M.C. 1042.

The London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain and Other (the "Prestige") (No 2) [2014] 1 Lloyd's Rep 309; [2015] 2 Lloyd's Rep. 36.

The Beaverford v. The Kafiristan, [1938] A.C. 136.

The Melanie (Owners) v. The San Onofre (Owners), [1925] A.C. 246.

The Whippingham, (1934) 48 Ll.L.Rep. 49.

The Wagon Mound, [1961] 1 Lloyd's Rep. 1 (P.C.).

The Wagon Mound (No. 2) Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. [1967] 1 A.C. 617

United Salvage Pty Ltd v. Louis Dreyfus Armateurs Snc, [2007] 1 Lloyd's Law Report Plus, 87.

Other Cases

Commonwealth of Puerto Rico v. s.s. Zoe Colocotroni, 456 F. Supp 1327 (D.O.R.), 1978

Conway v. O'Brien, 312 U.S. 492, 495 (1941)

Henry Newbank, The (1883), 11 Fed Cas (No, 6376).

Holder Borden, The (1847), 2 Fed. Cas. 331 (No. 6600) (D. Mass).

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 808 F. Supp. 2d 943 (E.D. La. 2011), aff'd sub nom. In re Deepwater Horizon, 745 F.3d 157 (5th Cir. 2014).

Pikelis v. Transcontinental & Western Air, 187 F.2d 122 (2d Cir.), cert. denied, 341 U.S. 951 (1951)

The Trail Smelter Arbitration (United States v. Canada), 3 UN Rep. on Intl. Arbitration Awards, 1905.

Trico Marine Operators Inc. v Dow Chemical Co., 809 F. Supp. 440; 1993 A.M.C. 942 (E.D.La. 1992).

Tuller v. KLM Royal Dutch Airlines, 292 F.2d 775 (D.C. Cir.), cert. denied, 368 U.S. 921 (1961)

Ultramares Corporation v. Touche, (1931), 255 N.Y. 170.

Wing Haug Bank v. Japan Air Lines Co., Ltd., 357 F. Supp. 94 (S.D.N.Y. 1973)

The Patmos case, IOPC Fund Annual Report, 1988.

The Rio Orinoco case, FUND/EXC. 28/9, 8 October, 1991, §3.3.2.

The Agip Abruzzo case, FUND/EXC 30/5, 17 December 1991, § 4.2.3.

Books

Ashburner, Walter, Rhodian Sea Laws, Oxford University Press, 1909, 2nd Edition published in 1976.

Bennett, Howard N., The Law of Marine Insurance, 2nd Edition, Oxford: Oxford University Press, 2006.

Birnie Patricia W. and Boyle, Alan E., International Law & the Environment, Oxford University Press, 2nd Edition, 2002.

Bokareva, Olena, Multimodal Transportation under the Rotterdam Rules, Lund University, 2015.

Caddell, Richard and Thomas, Rhidian (Eds), Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea - Legal Implications and Liabilities, London: Lawtext Publishing, 2013

Collum, Joseph, "Salvage: Making a Bad Situation Worse", The Maritime Executive, available at http://www.maritime-executive.com/magazine/global-salvage-review.

De La Rue, Colin, and Anderson, Charles B., Shipping and the Environment: Law and Practice, 2nd Edition, London: Informa, 2015.

Gaskell, Nicholas J.J., "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990", 16 Tulane Marime Law Journal 1, 1991.

Gaskell, N J J, Debattista, C and Swatton, R J., Chorley & Giles' Shipping Law, 8th Edition, London: Pitman Publishing, 1987.

Grime, Robert., Shipping Law, 2nd Edition, London: Sweet & Maxwell, 1991.

Gilman, Jonathan, Merkin, Robert M., Blanchard, Claire and Templeman, Mark., Arnould's Law of Marine Insurance, 18th Edition, London: Sweet & Maxwell, 2013.

Gold, Edgar, Chircop, Aldo, and Kindred, Hugh., Maritime Law, Toronto: Irwin Law, 2003.

Gauci, Gotthard, Oil Pollution at Sea: Civil Liability and Compensation for Damage, Chichester: John Wiley & Sons, 1997.

Hazelwood, Steven J., and David, Semark. P & I Clubs: Law and Practice. 4th Edition. London: Lloyd's List, 2010.

Hill, Christopher, Maritime Law, 6th Edtion, London:LLP, 2003.

Hill, Julian (Ed). O'May on Marine Insurance Law and Policy. London: Sweet & Maxwell, 1993.

Hodges, Susan, Law of Marine Insurance, London: Cavendish Publishing Ltd., 1996.

Hutchinson, Geoffrey, Roscoe's Admiralty Jurisdiction and Practice. 5th Edition. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd, 1931.

Mandaraka-Sheppard, Aleka, Modern Admiralty Law and Risk Management, 2nd Edition, London: Informa, 2009.

Mandaraka-Sheppard, Aleka, Modern Maritime Law Volume 2: Managing Risks and Liabilities, Third Edition, 2013.

Martinez, Norman A., Limitation of Liability in International Maritime Conventions: The relationship Between Global Limitation Conventions and Particular Liability Regimes, Routledge, 2011.

Meeson, Nigel and Kimbell, John A., Admiralty Jurisdiction and Practice, Fourth Edition, London: Informa, 2011.

Merkin, Robert, Annotated Marine Insurance Legislation, London: Lloyd's of London Press, 1997

Mudric, Miso, The Professional Salvor's Liability in the Law of Negligence and the Doctrine of Affirmative Damages, Münster: LIT Verlag, 2013.

M'Gonigle, Michael R., and Zacher, Mark W., Pollution, Politics and International Law: Tankers at Sea, Berkeley and Los Angeles: University of California Press, 1979.

Mukherjee Proshanto K. and Brownrigg Mark, Farthing on International Shipping, 4th Edition, Springer, 2013.

O'May, Donald & Hill, Julian, Marine Insurance Law and Policy, London: Sweet & Maxwell, 1993.

Pearsall, Judy (Ed), The New Oxford Dictionary of English, Oxford: Oxford University Press, 1998

Prosser, William L., Handbook of the Law of Torts, Fourth Edition, West Publishing Company, 1971.

Reddie, James, Historical View of the Law of Maritime Commerce, Edinburgh & London: William Blackwood & Sons, 1841.

Reeder, John (Ed), Brice on the Law of Salvage, 5th Edition, London: Sweet & Maxwell, 2011.

Rose, Francis D., Marine Insurance: Law and Practice, 2nd Edition, London: Informa, 2012.

Rose, Francis D., Kennedy and Rose Law of Salvage, 8th Edition, London: Sweet & Maxwell, 2013.

Rogers, W. V. H., Winfield & Jolowicz on Tort, 16th Edition, London: Sweet & Maxwell, 2002.

Shaw, Richard and Tsimplis, Michael "The Liabilities of the Vessel" in Yvonne Baatz (ed), Southampton on Shipping Law, London: Informa, 2008

Smith, Brian, State Responsibility and the Marine Environment: The Rules of Decision", Oxford Clarendon Press, 1988.

Susan Hodges, Law of Marine Insurance, London: Cavendish Publishing Ltd., 1996.

Tetley, William, and Robert C. Wilkins., International Conflict of Laws: Common, Civil, and Maritime, Montreal, QC, Canada: International Shipping Publications, 1994.

Tetley, William, International Maritime and Admiralty Law, Cowansville, Quebec: Éditions Yvon Blais, 2002.

Thomas, D. Rhidian, Maritime Liens, British Shipping Law Series, Vol. 14, London: Stevens & Sons, 1980.

Vincenzini, Enrico, International Salvage Law, London: Lloyd's of London Press, 1992.

Wiswall, F. L., The Development of Admiralty Jurisdiction and Practice since 1800, Cambridge University Press, 1970.

Wilson, D.J. & Cooke, J.H.S., Lowndes, R. & Rudolf G.R., The Law of General Average and the York-Antwerp Rules, 11th Edition, London: Sweet & Maxwell, 1990.

Winter, W.D., Marine Insurance, 3rd. Ed., New York, 1952.

Williams, Glanville, Textbook of Criminal Law, 2nd Edition, London: Stevens & Sons, 1983

Wright, Cecil A. and Linden, Allen M., Canadian Tort Law, Sixth Edition, Toronto: Butterworths, 1975.

Articles

Archie Bishop, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): Liability regimes in contemporary maritime law. London: Informa, 2007, pp. 99-105.

Beale, Gary. "Environmental Salvage and the 1989 Salvage Convention: Proposed Amendments to the Convention and Difficulties in Quantifying an Environmental Salvage Award", Environmental Law Review 16, No. 4 (2014): 248-261.

Binney, Brian F., "Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention." Washington Law Review, No.3 (1990): 639.

Bishop, Archie, "The Development of Environmental Salvage and Review of the London Salvage Convention 1989." Tulane Maritime Law Journal 37, No.1 (2012): 65-105.

Bishop, Archie, "Salvors – The Need for Responder Immunity and Places of Refuge", Lloyd's List events, April 2002.

Bishop, Archie, "The Liability of Salvors for Pollution", in D. Rhidian Thomas (Ed.): Liability regimes in contemporary maritime law. London: Informa, pp. 99-105

Bishop, Archie, "Environmental Salvage: Time for a Change" in Baris Soyer & Andrew Tettenborn (Eds), Pollution at Sea: Law and Liability, London: Informa , 2012.

Bishop, Archie, "Environmental Awards: How They Can Be Achieved", a speech on the CMI Colloquium Buenos Aires 2010, CMI Yearbook 2010: 488-492.

Brice, Geoffrey, "The Law of Salvage: A Time for Change? 'No Cure - No Pay' No Good?" Tulane Law Review, No. 5-6 (1999): 1831-1861.

Brice, Geoffrey, "Salvage and the Marine Environment." Tulane Law Review, No. 2-3 (1995): 669.

Brice, Geoffrey. "Salvage and the Role of the Insurer." Lloyds Maritime and Commercial Law Quarterly 26 (2000).

Busch, Todd, "Fair Reward for Protecting the Environment – the Salvor's Perspective", a speech on the CMI Colloquium Buenos Aires 2010, CMI Yearbook 2010: 493-498.

Cadwallader, F.J.J., "The Salvor's Duty of Care", Maritime Studies Management, 1973

Davies, Martin, "Whatever Happened to the Salvage Convention 1989?" Journal of Maritime Law & Commerce 39 (2008): 463.

De la Rue, Colin and Anderson, Charles B., "Environmental Salvage – Plus ça change, plus c'est la même chose?", available at the Skuld website, http://www.skuld.com/Documents/Topics/Ship/Environmental_Salvage/Environmental_Salvage_Article_October_2012.pdf?epslanguage=en.

Evans, Roger, "Pollution from Ships" Responder Immunity, The Nautical Institute, Southampton, 2007, at pp. 2-3, available at

http://www.nautinstlondon.co.uk/nautinstlondon/wp-content/uploads/2012/04/Roger-Evans-Paper-Responder-Immunity.pdf

Gaskell, Nicholas J.J., “The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990”, 16 Tulane Maritime Law Journal 1, 1991.

Gauci, Gotthard, “The Obligation to Sue and Labour in the Law of Marine Insurance – Time to Amend the Statutory Provisions”, The International Journal of Shipping Law, Part 1, March 2000.

Gold, Edgar, "Marine Salvage: Towards a New Regime" Journal of Maritime Law and Commerce 20 (1989): 487-503.

Gooding, Nicholas, "Environmental Salvage: The Marine Property Underwriter's View", a speech on the CMI Colloquium Buenos Aires 2010, CMI Yearbook 2010: 470-477.

Griggs, Patrick, “International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001”, available on the website of British Maritime Law Association at https://www.bmla.org.uk/documents/imo-bunker-convention.doc

Hetherington, Stuart, “Civil Liability and Monetary Incentives for Accepting Ships in Distress”, CMI Yearbook 2003: 457-467.

Hankins, Paul, “Responder Immunity – Its Time Has Come”, available at the website of American Salvage Association at http://www.americansalvage.org/marine-log/ML-Jan2014.pdf

Hed, Birgitta ,“Criminalization of Seafarers”, The Swedish Club Letter, No.1, May 2005

Hume, Charles, “CMI Review Of The Salvage Convention 1989 - Environmental Salvage”, a speech at the meetings of the US Maritime Law Association (MLA), Canadian MLA and the Maritime Law Association of Australia and New Zealand held in Hawaii in December 2011, available at the CMI website, http://www.comitemaritime.org/Uploads/Salvage%20Convention/Charles%20Hume%20paper%20-%20CMI%20Review%20of%20the%20Salvage%20Convention.pdf.

Hurst, Hugh, "Amending The Salvage Convention 1989 – The International Group Of P&I Clubs’ View", a speech on the CMI Colloquium Buenos Aires 2010, Buenos Aires, CMI Yearbook 2010: 499-510.

Jingjing Xu "The International Legal Framework of Ship-Source Marine Pollution" in Maximo Q. Mejia (Ed.) Selected Issues in Maritime Law and Policy - Liber Amicoram Proshanto K. Mukherjee, Nova Publications, 2013.

International Salvage Union, "Position Paper on the 1989 Salvage Convention", available at CMI official website, http://www.comitemaritime.org/Uploads/Salvage%20Convention/ISU%20Final%20Position%20Paper%20on%20Environmental%20Salvage%20Awards%20April%2012.pdf.

Kerr, Donald A., “The 1989 Salvage Convention: Expediency or Equity?”, Journal of Maritime Law and Commerce, Vol.20, No.4, 1989.

Khosla, Kiran, "Salvage Law—Is it Working? Does it Protect the Environment?", a speech on the CMI Colloquium Buenos Aires 2010,Buenos Aires, CMI Yearbook 2010: 478-487.

Lansakara, F., "Maritime Law of Salvage and Adequacy of Laws Protecting the Salvor's Interest", International Journal on Marine Navigation and Safety of Sea Transportation, No. 3 (2012):431-435.

Martinez, Norman A., Limitation of Liability in International Maritime Conventions: The relationship Between Global Limitation Conventions and Particular Liability Regimes, Routledge, 2011

Mukherjee, Proshanto K., "Salvage at Crossroads: Some Idle Thoughts and Reflections", Current Problems in International Maritime Law, Liber Amicorum in Loving Memory of Prof. Dr. A.N Yiannopoulos, Ankara: Adalet Yayinev, 2017

Mukherjee, Proshanto K., "Criminalisation and Unfair Treatment: The Seafarer's Perspective", CMI Yearbook, 2005-2006: 283 – 297.

Mukherjee, Proshanto K., "Essentials of the Regimes of Limitation of Liability in Maritime Law", The Admiral, Vol. IV, Accra: Ghana Shippers' Council, Unik Image, 2009.

Mukherjee, Proshanto K., "Refuge and Salvage" in Aldo Chircop & Olof Linden (Eds.) Places of Refuge for Ships, Leiden, Boston: Martinus Nijhoff, 2006.

Mukherjee, Proshanto K., "Economic Losses and Environmental Damage in the Law of Ship-source Pollution", in Aldo Chircop et al. (Eds.) The Regulation of International Shipping: International and Comparative Perspectives, Essays in Honor of Edgar Gold, Leiden, Boston: Martinus Nijhoff, 2012.

Mukherjee, Proshanto K., "Liability and Compensation for Environmental Damage Caused by Ship-Source Oil Pollution: Actionability of Claims in Michel G. Faure, Han Lixin and Shan Hongjun (Eds.) Marine Pollution Liability and Policy: China, Europe and the U.S., The Netherlands: Wolters Kluwer, 2010.

Mukherjee, Proshanto K., "The Penal Law of Ship-Source Pollution" in Tafsir Malick Ndiaye & Rudiger Wolfrum (Eds), Liber Amicorum Judge Thomas A. Mensah: Law of the Sea, Environmental Law and Settlement of Disputes", Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston: Martinus Nijhoff September 2007,

Mudric, Miso, "Liability Salvage - Environmental Award: A New Name for an Old Concept", Comparative Maritime Law / Poredbeno Pomorsko Pravo 49, No. 164 (2010): 471-492.

Nanda, Ved P., "The Torrey Canyon Disaster: Some Legal Aspects", (1967), 44 Denver L.J. 400.

Nummey, Thomas L., "Environmental Salvage Law in the Age of the Tanker", 20 Fordham Environmental Law Review, 2009:267-304.

O'Sullivan, Brendan P., "The Scope of the Sue & Labor Clause" J. of Mar L. & Com, Vol. 21, No. 4, October 1990.

Peck, William L. & Elmore, Allan F., "Responder Immunity and Salvage" in Marine Transportation, Proceedings of International Oil Spill Conference, 1995.

Redgwell, Catherine, "The International Law of Salvage", 134 Solic. J. 414, 1990.

Rooij, Hans van, “Governments hold the key to criminalization problem”, available at the website of ISU at http://www.marine-salvage.com/media_information/articles/criminalisation.htm

Shirley, Jim, “A Primer on Responder Immunity”, Marine News, June 2010, available at http://www.americansalvage.org/marine-news/MN_June_2010.pdf.

Soyer, Baris, "Ship-sourced Oil Pollution and Pure Economic Loss: The Quest for Overarching Principles", Torts Law Journal, 17, 2009.

Shaw, Richard & Tsimplis, Michael, “The Liabilities of the Vessel” in Yvonne Baatz (ed), Southampton on Shipping Law, London: Informa, 2008.

Thomas, D. Rhidian, “Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law”, 2 The Maritime Lawyer 57, 1977.

Thomas, D. Rhidian, “Salvorial Negligence and its Consequences”, [1977] 2 L.M.C.L.Q. 167

Thomas, D. Rhidian, “Marine salvage and the environment: developments, problems and prospects”, chapter 6 in Richard Caddell, Rhidian Thomas (Eds), Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea - Legal Implications and Liabilities, London: Lawtext Publishing, 2013.

Waldron, Jonathan K. “The Need for Enhanced Responder Immunity for Salvors Based on Lessons Learned from the Deepwater Horizon”, available at the website of American Salvage Association at http://www.americansalvage.org/soundings/Fall2011.pdf.

Wray, Michael J. and Reese, Rachel, “Does A Good Deed Go Unpunished? The Availability of Responder Immunity in An Oil Pollution Response”, 8 Texas Journal of Oil, Gas and Energy Law 349, 2012-2013.

Witte, Arnold, “Salvors voice concern over IMO Bunker Spill Convention”, available on the website of ISU at http://www.marine-salvage.com/media-information/articles/archive/salvors-voice-concern-over-imo-bunker-spill-convention/.

Wilson, Robert & Cecil, Nathan, “Oil Pollution Responder Immunity Now Part of Australian Law”, News & Events, December 2010, available at http://documents.jdsupra.com/2da2e4cc-56c1-415b-a7e3-25304892ad9b.pdf.

List of Conventions

International Convention on Salvage, 1989 (1953 UNTS 165)

Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (CLC 1992, 1956 U.N.T.S. 255)

Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund 1992, 1953 U.N.T.S. 373)

Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (2003 Supplementary Fund Protocol; IMO Doc., LEG/CONF. 14/20)

International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers 2001, 40 ILM 1493)

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS 1996, 35 I.L.M. 1406)

Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS 2010, available at the official website, http://www.hnsconvention.org/fileadmin/IOPC_Upload/hns/files/2010%20HNS%20Protocol_e.pdf)

Convention on Limitation of Liability for Maritime Claims (LLMC 1976, 1456 UNTS 221)

Protocol of 1996 to Amend The Convention on Limitation of Liability for Maritime Claims, 1976 [LLMC Protocol 1996, 35 ILM 1433 (1996)]

Convention on the Liability of Operators of Nuclear Ships [Nuclear Convention, 1962, 57 AJIL 268 (1963)]

International Convention Relating to Intervention on The High Seas (1969 Intervention Convention) [9 ILM 25 (1970)]

List of Legislation

Merchant Shipping Act 1995 (the United Kingdom)

Marine Insurance Act 1906 (the United Kingdom)

Oil Pollution Act 1990 (the United States)

Canada Shipping Act 2001

Canadian Arctic waters Pollution Prevention Act, 1970

Protection of the Sea Legislation Amendment Act, 2010 (Australia)

Cayman Islands Merchant Shipping Law, (2016 Revision)

Others

IOPC Funds, Claims Manual, 2016 Edition.

IOPC Funds, Guidelines for Presenting Claims for Clean Up and Preventive Measures, 2015 Edition.

IOPC Funds, Guidance for Member States: Measures to facilitate the claims handling process, 2015 Edition.

IOPC Funds, Guidance for Member States: Management of Fisheries Closures and Restrictions Following an Oil Spill, 2016 Edition

IOPC Funds, Guidelines for presenting claims in the tourism sector, 2014 Edition.

ICS, “Proposal for Review of The Salvage Convention: A Position Paper By The International Chamber Of Shipping”, available on the CMI website. http://www.comitemaritime.org/Uploads/Salvage%20Convention/Position%20Paper%20by%20ISC.pdf.

IMO Doc, Advice and guidance on issues brought to the Committee in connection with implementation of IMO instruments; places of refuge for ships in need of assistance, LEG 101/11/4, 2014.

IMO Doc, “Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Protection from Liability of Persons Taking Preventive and Salvage Measures”, LEG/CONF. 12/8 (12th January 2001).

IMO Doc, “Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Draft Resolution on Responder Immunity” LEG/CONF. 12/11 (6 February 2001).

CMI Guidelines on Oil Pollution Damage.

“Appendix to Report on Places of Refuge Submitted by Comité Maritime International (CMI) to the IMO Legal Committee: Details of Responses to Second Questionnaire”, CMI Yearbook 2003.

"Report of the International Working Group on Review of the Salvage Convention", CMI Yearbook (2012):140-177.

“Comite Maritime International Salvage Convention Questionnaire to Member Associations”, CMI Yearbook (2012): 197-204.

“Code of Practice Between International Salvage Union and International Group of P&I Clubs”, ISU official website, available at http://www.marine-salvage.com/documents/SCOPICCodeofPracticeISU.pdf.

“Code of Practice Between International Group of P&I Clubs and London Property Underwriters Regarding the Payment of the Fees and Expenses of the SCR Under SCOPIC”, Korea P&I official website, available at http://www.kpiclub.or.kr/data/SCOPIC_2014/06.Code_of_Practice_IG_P&I_Clubs-London_Property_Underwriters.pdf.

“First Questionnaire Summary of Questions and Response from NMLA’s”, CMI Yearbook (2012):205-219.

“Second Questionnaire on Review of Salvage Convention 1989”, CMI Yearbook (2012): 220-223.

“Second Questionnaire Summary of Responses”, CMI Yearbook (2012):224-229.

“Report of International Sub Committee Meeting (ISC) of May 2010”, CMI Yearbook (2012):239-264.

Spill Control Association of America, “Responder Immunity And The Deepwater Horizon”, available at http://www.scaa-spill.org/presentations/2012-hill-visit/Leave-Behind_Responder-Immunity-and-Deepwater-Horizon.pdf.

“Salvors pull together over oil spills and criminalization of seafarers”, Lloyd's List, 23 September 2004 (No.58751).

"ISU calls again for environmental salvage", coverage of a speech of the then ISU present Andreas Tsavliris, accessed on the World Shipping website, http://www.world-shipping.net/readnews.php?ide=126&PHPSESSID=4e56218bb4c6afa84f9e5a9bcc0a24ea.

“Appendix to Report on Places of Refuge Submitted by Commité Maritime International (CMI) to the IMO Legal Committee: Details of Responses To Second Questionnaire”, CMI Yearbook 2003

"Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Draft Resolution on Responder Immunity" LEG/CONF. 12/11 (6 February 2001)

"Consideration of A Draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage: Protection from Liability of Persons Taking Preventive and Salvage Measures", LEG/CONF. 12/8 (12th January 2001)

"Getting the Karachi Eight home", Lloyd's List, 10 June 2004 (No.58676).

"Salvors pull together over oil spills and criminalization of seafarers", Lloyd's List, 23 September 2004 (No.58751)

Allison, Simon, "Salvage Companies and Protection of the Marine environment: Time to Pay the Piper?", M. Phil. Thesis, University of Western Australia, 2015, available at http://research-repository.uwa.edu.au/files/4994451/Allison_Simon_2015.pdf.

Evans, Roger, "Pollution from Ships" Responder Immunity, The Nautical Institute, Southampton, 2007, at pp. 2-3, available at http://www.nautinstlondon.co.uk/nautinstlondon/wp-content/uploads/2012/04/Roger-Evans-Paper-Responder-Immunity.pdf.

Gard, "Environmental salvage - It sounds good but is it?", http://www.gard.no/web/updates/content/20651771/environmental-salvage-it-sounds-good-but-is-it.

Malashina, Natalia, "Law Reform in the International Regime of Salvage: The Insurance Perspective", Unpublished LL.M. thesis, Lund University, 2010.

Peck, William L. and Elmore, Allan F., "Responder Immunity and Salvage" in Marine Transportation, Proceedings of International Oil Spill Conference, 1995.

Su, Lu, An analysis of the salvage market in China, Unpublished M.Sc. dissertation, World Maritime University, 2009.

Witte, Arnold, "Salvors voice concern over IMO Bunker Spill Convention", available on the website of ISU at http://www.marine-salvage.com/media-information/articles/archive/salvors-voice-concern-over-imo-bunker-spill-convention/.

Willmer, J., "Salvage and Current Problems", Public lecture at London Shipping Law Centre, June 1997.

Rooij, Hans van, "Governments Hold the Key to Criminalisation Problem", available at the website of ISU at http://www.marine-salvage.com/media_information/articles/criminalisation.htm.

Annex I
– LOF 1980

LLOYD'S

NOTES.
1. Insert name of person signing on behalf of Owners of property to be salved. The Master should sign wherever possible.
2 The Contractor's name should always be inserted in line 3 and whenever the Agreement is signed by the Master of the Salving vessel or other person on behalf of the Contractor the name of the Master or other person must also be inserted in line 3 before the words "for and on behalf of". The words "for and on behalf of" should be deleted where a Contractor signs personally.

STANDARD FORM OF

SALVAGE AGREEMENT

(APPROVED AND PUBLISHED BY THE COMMITTEE OF LLOYD'S)

NO CURE—NO PAY

On board the
Dated 19

IT IS HEREBY AGREED between Captain for and on behalf of the Owners of the " " her cargo freight bunkers and stores and for and on behalf of (hereinafter called "the Contractor"):—

1. (a) The Contractor agrees to use his best endeavours to salve the and/or her cargo bunkers and stores and take them to or other place to be hereafter agreed or if no place is named or agreed to a place of safety. The Contractor further agrees to use his best endeavours to prevent the escape of oil from the vessel while performing the services of salving the subject vessel and/or her cargo bunkers and stores. The services shall be rendered and accepted as salvage services upon the principle of "no cure—no pay" except that where the property being salved is a tanker laden or partly laden with a cargo of oil and without negligence on the part of the Contractor and/or his Servants and/or Agents (1) the services are not successful or (2) are only partially successful or (3) the Contractor is prevented from completing the services the Contractor shall nevertheless be awarded solely against the Owners of such tanker his reasonably incurred expenses and an increment not exceeding 15 per cent of such expenses but only if and to the extent that such expenses together with the increment are greater than any amount otherwise recoverable under this Agreement. Within the meaning of the said exception to the principle of "no cure—no pay" expenses shall in addition to actual out of pocket expenses include a fair rate for all tugs craft personnel and other equipment used by the Contractor in the services and oil shall mean crude oil fuel oil heavy diesel oil and lubricating oil.

(b) The Contractor's remuneration shall be fixed by arbitration in London in the manner herein prescribed and any other difference arising out of this Agreement or the operations thereunder shall be referred to arbitration in the same way. In the event of the services referred to in this Agreement or any part of such services having been already rendered at the date of this Agreement by the Contractor to the said vessel and/or her cargo bunkers and stores the provisions of this Agreement shall apply to such services.

(c) It is hereby further agreed that the security to be provided to the Committee of Lloyd's the Salved Values the Award and/or Interim Award and/or Award on Appeal of the Arbitrator and/or Arbitrator(s) on Appeal shall be in currency. If this Clause is not completed then the security to be provided and the Salved Values the Award and/or Interim Award and/or Award on Appeal of the Arbitrator and/or Arbitrator(s) on Appeal shall be in Pounds Sterling.

(d) This Agreement shall be governed by and arbitration thereunder shall be in accordance with English law.

15 1.68
3 12.24
13 10.26
12.4.50
10.6.53
20 12.67
23.2.72
21.5.80 0168

2. The Owners their Servants and Agents shall co-operate fully with the Contractor in and about the salvage including obtaining entry to the place named in Clause 1 of this Agreement or such other place as may be agreed or if applicable the place of safety to which the salved property is taken. The Owners shall promptly accept redelivery of the salved property at such place. The Contractor may make reasonable use of the vessel's machinery gear equipment anchors chains stores and other appurtenances during and for the purpose of the operations free of expense but shall not unnecessarily damage abandon or sacrifice the same or any property the subject of this Agreement.

3. The Master or other person signing this Agreement on behalf of the property to be salved is not authorised to make or give and the Contractor shall not demand or take any payment draft or order as inducement to or remuneration for entering into this Agreement.

PROVISIONS AS TO SECURITY

4. The Contractor shall immediately after the termination of the services or sooner in appropriate cases notify the Committee of Lloyd's and where practicable the Owners of the amount for which he requires security (inclusive of costs expenses and interest). Unless otherwise agreed by the parties such security shall be given to the Committee of Lloyd's and security so given shall be in a form approved by the Committee and shall be given by persons firms or corporations resident in the United Kingdom either satisfactory to the Committee of Lloyd's or agreed by the Contractor. The Committee of Lloyd's shall not be responsible for the sufficiency (whether in amount or otherwise) of any security which shall be given nor for the default or insolvency of any person firm or corporation giving the same.

5. Pending the completion of the security as aforesaid the Contractor shall have a maritime lien on the property salved for his remuneration. Where the aforementioned exception to the principle of "no cure—no pay" becomes likely to be applicable the Owners of the vessel shall on demand of the Contractor provide security for the Contractor's remuneration under the aforementioned exception in accordance with Clause 4 hereof. The salved property shall not without the consent in writing of the Contractor be removed from the place (within the terms of Clause 1) to which the property is taken by the Contractor on the completion of the salvage services until security has been given as aforesaid. The Owners of the vessel their Servants and Agents shall use their best endeavours to ensure that the Cargo Owners provide security in accordance with the provisions of Clause 4 of this Agreement before the cargo is released. The Contractor agrees not to arrest or detain the property salved unless (a) the security be not given within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of the termination of the services (the Committee of Lloyd's not being responsible for the failure of the parties concerned to provide the required security within the said 14 days) or (b) the Contractor has reason to believe that the removal of the property is contemplated contrary to the above agreement. In the event of security not being provided or in the event of (1) any attempt being made to remove the property salved contrary to this agreement or (2) the Contractor having reasonable grounds to suppose that such an attempt will be made the Contractor may take steps to enforce his aforesaid lien. The Arbitrator appointed under Clause 6 or the person(s) appointed under Clause 13 hereof shall have power in their absolute discretion to include in the amount awarded to the Contractor the whole or such part of the expense incurred by the Contractor in enforcing or protecting by insurance or otherwise or in taking reasonable steps to enforce or protect his lien as they shall think fit.

PROVISIONS AS TO ARBITRATION

6. (a) Where security within the provisions of this Agreement is given to the Committee of Lloyd's in whole or in part the said Committee shall appoint an Arbitrator in respect of the interests covered by such security.

(b) Whether security has been given or not the Committee of Lloyd's shall appoint an Arbitrator upon receipt of a written or telex or telegraphic notice of a claim for arbitration from any of the parties entitled or authorised to make such a claim.

7. Where an Arbitrator has been appointed by the Committee of Lloyd's and the parties do not wish to proceed to arbitration the parties shall jointly notify the said Committee in writing or by telex or by telegram and the said Committee may thereupon terminate the appointment of such Arbitrator as they may have appointed in accordance with Clause 6 of this Agreement.

8. Any of the following parties may make a claim for arbitration viz.:—(1) The Owners of the ship. (2) The Owners of the cargo or any part thereof. (3) The Owners of any freight separately at risk or any part thereof. (4) The Contractor. (5) The Owners of the bunkers and/or stores. (6) Any other person who is a party to this Agreement.

9. If the parties to any such Arbitration or any of them desire to be heard or to adduce evidence at the Arbitration they shall give notice to that effect to the Committee of Lloyd's and shall respectively nominate a person in the United Kingdom to represent them for all the purposes of the Arbitration and failing such notice and nomination being given the Arbitrator or Arbitrator(s) on Appeal may proceed as if the parties failing to give the same had renounced their right to be heard or adduce evidence.

10. The remuneration for the services within the meaning of this Agreement shall be fixed by an Arbitrator to be appointed by the Committee of Lloyd's and he shall have power to make an Interim Award ordering such payment on account as may seem fair and just and on such terms as may be fair and just.

CONDUCT OF THE ARBITRATION

11. The Arbitrator shall have power to obtain call for receive and act upon any such oral or documentary evidence or information (whether the same be strictly admissible as evidence or not) as he may think fit and to conduct the Arbitration in such manner in all respects as he may think fit and shall if in his opinion the amount of the security demanded is excessive have power in his absolute discretion to condemn the Contractor in the whole or part of the expense of providing such security and to deduct the amount in which the Contractor is so condemned from the salvage remuneration. Unless the Arbitrator shall otherwise direct the parties shall be at liberty to adduce expert evidence at the Arbitration. Any Award of the Arbitrator shall (subject to appeal as provided in this Agreement) be final and binding on all the parties concerned. The Arbitrator and the Committee of Lloyd's may charge reasonable fees and expenses for their services in connection with the Arbitration whether it proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the Arbitration. Save as aforesaid the statutory provisions as to Arbitration for the time being in force in England shall apply.

12. Interest at a rate per annum to be fixed by the Arbitrator from the expiration of 21 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of publication of the Award and/or Interim Award by the Committee of Lloyd's until the date payment is received by the Committee of Lloyd's both dates inclusive shall (subject to appeal as provided in this Agreement) be payable upon any sum awarded after deduction of any sums paid on account.

PROVISIONS AS TO APPEAL

13. Any of the persons named under Clause 8 may appeal from the Award but not without leave of the Arbitrator(s) on Appeal from an Interim Award made pursuant to the provisions of Clause 10 hereof by giving written or telegraphic or telex Notice of Appeal to the Committee of Lloyd's within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of the publication by the Committee of Lloyd's of the Award and may (without prejudice to their right of appeal under the first part of this Clause) within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after receipt by them from the Committee of Lloyd's of notice of such appeal (such notice if sent by post to be deemed to be received on the day following that on which the said notice was posted) give written or telegraphic or telex Notice of Cross-Appeal to the Committee of Lloyd's. As soon as practicable after receipt of such notice or notices the Committee of Lloyd's shall refer the Appeal to the hearing and determination of a person or persons selected by it. In the event of an Appellant or Cross-Appellant withdrawing his Notice of Appeal or Cross-Appeal the hearing shall nevertheless proceed in respect of such Notice of Appeal or Cross-Appeal as may remain. Any Award on Appeal shall be final and binding on all the parties concerned whether such parties were represented or not at either the Arbitration or at the Arbitration on Appeal.

CONDUCT OF THE APPEAL

14. No evidence other than the documents put in on the Arbitration and the Arbitrator's notes of the proceedings and oral evidence if any at the Arbitration and the Arbitrator's Reasons for his Award and Interim Award if any and the transcript if any of any evidence given at the Arbitration shall be used on the Appeal unless the Arbitrator(s) on the Appeal shall in his or their discretion call for or allow other evidence. The Arbitrator(s) on Appeal may conduct the Arbitration on Appeal in such manner in all respects as he or they may think fit and may act upon any such evidence or information (whether the same be strictly admissible as evidence or not) as he or they may think fit and may maintain increase or reduce the sum awarded by the Arbitrator with the like power as is conferred by Clause 11 on the Arbitrator to condemn the Contractor in the whole or part of the expense of providing security and to deduct the amount disallowed from the salvage remuneration. And he or they shall also make such order as he or they shall think fit as to the payment of interest on the sum awarded to the Contractor.

The Arbitrator(s) on the Appeal may direct in what manner the costs of the Arbitration and of the Arbitration on Appeal shall be borne and paid and he or they and the Committee of Lloyd's may charge reasonable fees and expenses for their services in connection with the Arbitration on Appeal whether it proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the Arbitration on Appeal. Save as aforesaid the statutory provisions as to Arbitration for the time being in force in England shall apply.

PROVISIONS AS TO PAYMENT

15. (a) In case of Arbitration if no Notice of Appeal be received by the Committee of Lloyd's within 14 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) after the date of the publication by the Committee of the Award and/or Interim Award the Committee shall call upon the party or parties concerned to pay the amount awarded and in the event of non-payment shall realize or enforce the security and pay therefrom to the Contractor (whose receipt shall be a good discharge to it) the amount awarded to him together with interest as hereinbefore provided but the Contractor shall reimburse the parties concerned to such extent as the final Award is less than the Interim Award.

(b) If Notice of Appeal be received by the Committee of Lloyd's in accordance with the provisions of Clause 13 hereof it shall as soon as but not until the Award on Appeal has been published by it call upon the party or parties concerned to pay the amount awarded and in the event of non-payment shall realize or enforce the security and pay therefrom to the Contractor (whose receipt shall be a good discharge to it) the amount awarded to him together with interest if any in such manner as shall comply with the provisions of the Award on Appeal.

(c) If the Award and/or Interim Award and/or Award on Appeal provides or provide that the costs of the Arbitration and/or of the Arbitration on Appeal or any part of such costs shall be borne by the Contractor such costs may be deducted from the amount awarded before payment is made to the Contractor by the Committee of Lloyd's unless satisfactory security is provided by the Contractor for the payment of such costs.

(d) If any sum shall become payable to the Contractor as remuneration for his services and/or interest and/or costs as the result of an agreement made between the Contractor and the parties interested in the property salved or any of them the Committee of Lloyd's in the event of non-payment shall realize or enforce the security and pay therefrom to the Contractor (whose receipt shall be a good discharge to it) the amount agreed upon between the parties.

(e) Without prejudice to the provisions of Clause 4 hereof the liability of the Committee of Lloyd's shall be limited in any event to the amount of security held by it.

GENERAL PROVISIONS

16. Notwithstanding anything hereinbefore contained should the operations be only partially successful without any negligence or want of ordinary skill and care on the part of the Contractor his Servants or Agents and any portion of the vessel her appurtenances bunkers stores and cargo be salved by the Contractor he shall be entitled to reasonable remuneration and such reasonable remuneration shall be fixed in case of difference by Arbitration in manner hereinbefore prescribed.

17. The Master or other person signing this Agreement on behalf of the property to be salved enters into this Agreement as Agent for the vessel her cargo freight bunkers and stores and the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.

18. In considering what sums of money have been expended by the Contractor in rendering the services and/or in fixing the amount of the Award and/or Interim Award and/or Award on Appeal the Arbitrator or Arbitrator(s) on Appeal shall to such an extent and in so far as it may be fair and just in all the circumstances give effect to the consequences of any change or changes in the value of money or rates of exchange which may have occurred between the completion of the services and the date on which the Award and/or Interim Award and/or Award on Appeal is made.

19. Any Award notice authority order or other document signed by the Chairman of Lloyd's or any person authorised by the Committee of Lloyd's for the purpose shall be deemed to have been duly made or given by the Committee of Lloyd's and shall have the same force and effect in all respects as if it had been signed by every member of the Committee of Lloyd's.

20. The Contractor may claim salvage and enforce any Award or agreement made between the Contractor and the parties interested in the property salved against security provided under this Agreement if any in the name and on behalf of any Sub-Contractors Servants or Agents including Masters and members of the Crews of vessels employed by him in the services rendered hereunder provided that he first indemnifies and holds harmless the Owners of the property salved against all claims by or liabilities incurred to the said persons. Any such indemnity shall be provided in a form satisfactory to such Owners.

21. The Contractor shall be entitled to limit any liability to the Owners of the subject vessel and/or her cargo bunkers and stores which he and/or his Servants and/or Agents may incur in and about the services in the manner and to the extent provided by English law and as if the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 were part of the law of England.

For and on behalf of the Contractor	For and on behalf of the Owners of property to be salved.
(To be signed either by the Contractor personally or by the Master of the salving vessel or other person whose name is inserted in line 3 of this Agreement.)	(To be signed by the Master or other person whose name is inserted in line 1 of this Agreement.)

Annex II
– LOF 2011

LOF 2011

LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(Approved and Published by the Council of Lloyd's)

NO CURE - NO PAY

1. Name of the salvage Contractors: (referred to in this agreement as "the Contractors")	2. Property to be salved: The vessel: her cargo freight bunkers stores and any other property thereon but excluding the personal effects or baggage of passengers master or crew (referred to in this agreement as "the property")
3. Agreed place of safety:	4. Agreed currency of any arbitral award and security (if other than United States dollars)
5. Date of this agreement	6. Place of agreement
7. Is the Scopic Clause incorporated into this agreement? State alternative : Yes/No	
8. Person signing for and on behalf of the Contractors Signature:	9. Captain or other person signing for and on behalf of the property Signature:

A Contractors' basic obligation: The Contractors identified in Box 1 hereby agree to use their best endeavours to salve the property specified in Box 2 and to take the property to the place stated in Box 3 or to such other place as may hereafter be agreed. If no place is inserted in Box 3 and in the absence of any subsequent agreement as to the place where the property is to be taken the Contractors shall take the property to a place of safety.

B Environmental protection: While performing the salvage services the Contractors shall also use their best endeavours to prevent or minimise damage to the environment.

C Scopic Clause: Unless the word "No" in Box 7 has been deleted this agreement shall be deemed to have been made on the basis that the Scopic Clause is not incorporated and forms no part of this agreement. If the word "No" is deleted in Box 7 this shall not of itself be construed as a notice invoking the Scopic Clause within the meaning of sub-clause 2 thereof.

D **Effect of other remedies:** Subject to the provisions of the International Convention on Salvage 1989 as incorporated into English law ("the Convention") relating to special compensation and to the Scopic Clause if incorporated the Contractors services shall be rendered and accepted as salvage services upon the principle of "no cure - no pay" and any salvage remuneration to which the Contractors become entitled shall not be diminished by reason of the exception to the principle of "no cure - no pay" in the form of special compensation or remuneration payable to the Contractors under a Scopic Clause.

E **Prior services:** Any salvage services rendered by the Contractors to the property before and up to the date of this agreement shall be deemed to be covered by this agreement.

F **Duties of property owners:** Each of the owners of the property shall cooperate fully with the Contractors. In particular:

(i) the Contractors may make reasonable use of the vessel's machinery gear and equipment free of expense provided that the Contractors shall not unnecessarily damage abandon or sacrifice any property on board;

(ii) the Contractors shall be entitled to all such information as they may reasonably require relating to the vessel or the remainder of the property provided such information is relevant to the performance of the services and is capable of being provided without undue difficulty or delay;

(iii) the owners of the property shall co-operate fully with the Contractors in obtaining entry to the place of safety stated in Box 3 or agreed or determined in accordance with Clause A.

G **Rights of termination:** When there is no longer any reasonable prospect of a useful result leading to a salvage reward in accordance with Convention Articles 12 and/or 13 either the owners of the vessel or the Contractors shall be entitled to terminate the services hereunder by giving reasonable prior written notice to the other.

H **Deemed performance:** The Contractors' services shall be deemed to have been performed when the property is in a safe condition in the place of safety stated in Box 3 or agreed or determined in accordance with clause A. For the purpose of this provision the property shall be regarded as being in safe condition notwithstanding that the property (or part thereof) is damaged or in need of maintenance if (i) the Contractors are not obliged to remain in attendance to satisfy the requirements of any port or habour authority, governmental agency or similar authority and (ii) the continuation of skilled salvage services from the Contractors or other salvors is no longer necessary to avoid the property becoming lost or significantly further damaged or delayed.

I **Arbitration and the LSSA Clauses:** The Contractors' remuneration and/or special compensation shall be determined by arbitration in London in the manner prescribed by Lloyd's Standard Salvage and Arbitration Clauses ("the LSSA Clauses") and Lloyd's Procedural Rules in force at the date of this agreement. The provisions of the said LSSA Clauses and Lloyd's Procedural Rules are deemed to be incorporated in this agreement and form an integral part hereof. Any other difference arising out of this agreement or the operations hereunder shall be referred to arbitration in the same way.

J **Governing law:** This agreement and any arbitration hereunder shall be governed by English law.

K **Scope of authority:** The Master or other person signing this agreement on behalf of the property identified in Box 2 enters into this agreement as agent for the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.

L **Inducements prohibited:** No person signing this agreement or any party on whose behalf it is signed shall at any time or in any manner whatsoever offer provide make give or promise to provide or demand or take any form of inducement for entering into this agreement.

IMPORTANT NOTICES

1 **Salvage security.** As soon as possible the owners of the vessel should notify the owners of other property on board that this agreement has been made. If the Contractors are successful the owners of such property should note that it will become necessary to provide the Contractors with salvage security promptly in accordance with Clause 4 of the LSSA Clauses referred to in Clause I. The provision of General Average security does not relieve the salved interests of their separate obligation to provide salvage security to the Contractors.

2 **Incorporated provisions.** Copies of the applicable Scopic Clause, the LSSA Clauses and Lloyd's Procedural Rules in force at the date of this agreement may be obtained from (i) the Contractors or (ii) the Salvage Arbitration Branch at Lloyd's, One Lime Street, London EC3M 7HA.

3 **Awards.** The Council of Lloyd's is entitled to make available the Award, Appeal Award and Reasons on www.lloydsagency.com (the website) subject to the conditions set out in Clause 12 of the LSSA Clauses.

4 **Notification to Lloyd's**. The Contractors shall within 14 days of their engagement to render services under this agreement notify the Council of Lloyd's of their engagement and forward the signed agreement or a true copy thereof to the Council as soon as possible. The Council will not charge for such notification.

Tel.No. + 44(0)20 7327 5408/5407
Fax No. +44(0)20 7327 6827
E-mail: lloyds-salvage@lloyds.com
www.lloydsagency.com

15.1.08 3.12.24 13.10.26 12.4.50 10.6.53 20.12.67
23.2.72 21.5.80 5.9.90 1.1.95 1.9.2000 9.5.2011

Annex III
– SCOPIC 2018

SCOPIC CLAUSE

1. General

This SCOPIC clause is supplementary to any Lloyd's Form Salvage Agreement "No Cure - No Pay" ("Main Agreement") which incorporates the provisions of Article 14 of the International Convention on Salvage 1989 ("Article 14"). The definitions in the Main Agreement are incorporated into this SCOPIC clause. If the SCOPIC clause is inconsistent with any provisions of the Main Agreement or inconsistent with the law applicable hereto, the SCOPIC clause, once invoked under sub-clause 2 hereof, shall override such other provisions to the extent necessary to give business efficacy to the agreement. Subject to the provisions of sub-clause 4 hereof, the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive shall be substituted by the method of assessment set out hereinafter. If this SCOPIC clause has been incorporated into the Main Agreement the Contractor may make no claim pursuant to Article 14 except in the circumstances described in sub-clause 4 hereof. For the purposes of liens and time limits the services hereunder will be treated in the same manner as salvage.

2. Invoking the SCOPIC Clause

The Contractor shall have the option to invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a "threat of damage to the environment". The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with Convention Article 13 as incorporated into the Main Agreement ("Article 13").

3. Security for SCOPIC Remuneration

(i) The owners of the vessel shall provide to the Contractor within 2 working days (excluding Saturdays and Sundays and holidays usually observed at Lloyd's) after receiving written notice from the contractor invoking the SCOPIC clause, a bank guarantee or P&I Club letter (hereinafter called "the Initial Security") in a form reasonably satisfactory to the Contractor providing security for his claim for SCOPIC remuneration in the sum of US$3 million, inclusive of interest and costs.

(ii) If, at any time after the provision of the Initial Security the owners of the vessel reasonably assess the SCOPIC remuneration plus interest and costs due hereunder to be less than the security in place, the owners of the vessel shall be entitled to require the Contractor to reduce the security to a reasonable sum and the Contractor shall be obliged to do so once a reasonable sum has been agreed.

(iii) If at any time after the provision of the Initial Security the Contractor reasonably assesses the SCOPIC remuneration plus interest and costs due hereunder to be greater than the security in place, the Contractor shall be entitled to require the owners of the vessel to increase the security (hereinafter called "the Increased Security") to a reasonable sum and the owners of the vessel shall be obliged to do so once a reasonable sum has been agreed.

(iv) In the absence of agreement, any dispute concerning the proposed Guarantor, the form of the security or the amount of any reduction or increase in the security in place shall be resolved by the Arbitrator.

4. Withdrawal and Termination by the Contractor

(i) If the owners of the vessel do not provide the Initial Security within the said 2 working days, the Contractor, at his option, and on giving notice to the owners of the vessel, shall be entitled to withdraw from all the provisions of the SCOPIC clause and revert to his rights under the Main Agreement including Article 14 which shall apply as if the SCOPIC clause had not existed. PROVIDED THAT this right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal the owners of the vessel have still not provided the Initial Security or any alternative security which the owners of the vessel and the Contractor may agree will be sufficient.

(ii) If the owners of the vessel do not provide the Increased Security within 2 working days of the date upon which the reasonable sum for such Increased Security has been agreed between the Contractor and the owners of the vessel or has otherwise been determined by the Arbitrator, the Contractor, at his option, and on giving notice to the owners of the vessel, shall be entitled to terminate the services under both the SCOPIC clause and the Main Agreement. The Contractor will in that event be entitled to payment of all SCOPIC remuneration due up to and including the date of such termination. The assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix A hereof including a reasonable time for demobilisation after the date of such termination.

5. Tariff Rates

(i) SCOPIC remuneration shall mean the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out of pocket expenses; and bonus due.

(ii) SCOPIC remuneration in respect of all personnel; tugs and other craft; and portable salvage equipment shall be assessed on a time and materials basis in accordance with the Tariff set out in Appendix "A". This tariff will apply until reviewed and amended by the SCOPIC Committee in accordance with Appendix B(1)(b). The tariff rates which will be used to calculate SCOPIC remuneration are those in force at the time the salvage services take place.

(iii) "Out of pocket" expenses shall mean all those monies reasonably paid by or for and on behalf of the Contractor to any third party and in particular includes the hire of men, tugs, other craft and equipment used and other expenses reasonably necessary for the operation. They will be agreed at cost, PROVIDED THAT:

(a) If the expenses relate to the hire of men, tugs, other craft and equipment from another ISU member or their affiliate(s), the amount due will be calculated on the tariff rates set out in Appendix "A" regardless of the actual cost.

(b) If men, tugs, other craft and equipment are hired from any party who is not an ISU member and the hire rate is greater than the tariff rates referred to in Appendix "A" the actual cost will be allowed in full, subject to the Special Casualty Representative ("SCR") being satisfied that in the particular circumstances of the case, it was reasonable for the Contractor to hire such items at that cost. If an SCR is not appointed or if there is a dispute, then the Arbitrator shall decide whether the expense was reasonable in all in the circumstances.

(c) Any out of pocket expense incurred during the course of the service in a currency other than US dollars shall for the purpose of the SCOPIC clause be converted to US dollars at the rate prevailing at the termination of the services.

1.8.1999
1.9.2000
1.1.2005
1.7.2007
1.1.2011
1.1.2014
1.8.2018

(iv) In addition to the rates set out above and any out of pocket expenses, the Contractor shall be entitled to a standard bonus of 25% of those rates except that if the out of pocket expenses described in sub-paragraph 5(iii)(b) exceed the applicable tariff rates in Appendix "A" the Contractor shall be entitled to a bonus such that he shall receive in total

(a) The actual cost of such men, tugs, other craft and equipment plus 10% of the cost, or

(b) The tariff rate for such men, tugs, other craft and equipment plus 25% of the tariff rate whichever is the greater.

6. Article 13 Award

(i) The salvage services under the Main Agreement shall continue to be assessed in accordance with Article 13, even if the Contractor has invoked the SCOPIC clause. SCOPIC remuneration as assessed under sub-clause 5 above will be payable only by the owners of the vessel and only to the extent that it exceeds the total Article 13 Award (or, if none, any potential Article 13 Award) payable by all salved interests (including cargo, bunkers, lubricating oil and stores) before currency adjustment and before interest and costs even if the Article 13 Award or any part of it is not recovered.

(ii) In the event of the Article 13 Award or settlement being in a currency other than United States dollars it shall, for the purposes of the SCOPIC clause, be exchanged at the rate of exchange prevailing at the termination of the services under the Main Agreement.

(iii) The salvage Award under Article 13 shall not be diminished by reason of the exception to the principle of "No Cure - No Pay" in the form of SCOPIC remuneration.

7. Discount

If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.

8. Payment of SCOPIC Remuneration

(i) The date for payment of any SCOPIC remuneration which may be due hereunder will vary according to the circumstances.

(a) If there is no potential salvage award within the meaning of Article 13 as incorporated into the Main Agreement then, subject to Appendix B(5)(c)(iv), the undisputed amount of SCOPIC remuneration due hereunder will be paid by the owners of the vessel within 1 month of the presentation of the claim. Interest on sums due will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.

(b) If there is a claim for an Article 13 salvage award as well as a claim for SCOPIC remuneration, subject to Appendix B(5)(c)(iv), 75% of the amount by which the assessed SCOPIC remuneration exceeds the total Article 13 security demanded from ship and cargo will be paid by the owners of the vessel within 1 month and any undisputed balance paid when the Article 13 salvage award has been assessed and falls due. Interest will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.

(ii) The Contractor hereby agrees to give an indemnity in a form acceptable to the owners of the vessel in respect of any overpayment in the event that the SCOPIC remuneration due ultimately proves to be less than the sum paid on account.

9. Termination

(i) The owners of the vessel may at any time terminate the obligation to pay SCOPIC remuneration after the SCOPIC clause has been invoked under sub-clause 2 hereof provided that the Contractor shall be entitled to at least 5 clear days' notice of such termination. In the event of such termination the assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix A hereof including time for demobilisation to the extent that such time did reasonably exceed the 5 days' notice of termination.

(ii) The termination provisions contained in Clause 4(ii) and sub-clause 9(i) above shall only apply if the Contractor is not prevented from demobilising his equipment by Government, Local or Port Authorities or any other officially recognised body having jurisdiction over the area where the services are being rendered.

10. Duties of Contractor

The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the vessel and property thereon and in so doing to prevent or minimise damage to the environment.

11. Article 18 – 1989 Salvage Convention

The Contractor may be deprived of the whole or part of the payment due under the SCOPIC clause to the extent that the salvage operations thereunder have become necessary or more difficult or more prolonged or the salved fund has been reduced or extinguished because of fault or neglect on its part or if the Contractor has been guilty of fraud or other dishonest conduct.

12. Special Casualty Representative ("SCR")

Once this SCOPIC clause has been invoked in accordance with sub-clause 2 hereof the owners of the vessel may at their sole option appoint an SCR to attend the salvage operation in accordance with the terms and conditions set out in Appendix B. Any SCR so appointed shall not be called upon by any of the parties hereto to give evidence relating to non-salvage issues.

13. Special Representatives

At any time after the SCOPIC clause has been invoked the Hull and Machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the vessel may each appoint one special representative (hereinafter called respectively the "Special Hull Representative" and the "Special Cargo Representative" and collectively called the "Special Representatives") at the sole expense of the appointor to attend the casualty to observe and report upon the salvage operation on the terms and conditions set out in Appendix C hereof. Such Special Representatives shall be technical men and not practising lawyers.

14. Pollution Prevention

The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.

15. General Average

SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel.

16. Any dispute arising out of this SCOPIC clause or the operations thereunder shall be referred to Arbitration as provided for under the Main Agreement.

Annex IV – International Convention on Salvage, 1989

INTERNATIONAL CONVENTION ON SALVAGE, 1989

THE STATES PARTIES TO THE PRESENT CONVENTION,

RECOGNIZING the desirability of determining by agreement uniform international rules regarding salvage operations,

NOTING that substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910,

CONSCIOUS of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment,

CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger,

HAVE AGREED as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1

Definitions

For the purpose of this Convention:

(a) "Salvage operation" means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.

(b) "Vessel" means any ship or craft, or any structure capable of navigation.

(c) "Property" means any property not permanently and intentionally attached to the shoreline and includes freight at risk.

(d) "Damage to the environment" means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

(e) "Payment" means any reward, remuneration or compensation due under this Convention.

(f) "Organization" means the International Maritime Organization.

(g) "Secretary-General" means the Secretary-General of the Organization.

Article 2

Application of the Convention

This Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party.

Article 3

Platforms and drilling units

This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.

Article 4

State-owned vessels

1. Without prejudice to article 5, this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.

2. Where a State Party decides to apply the Convention to its warships or other vessels described in paragraph 1, it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

Article 5

Salvage operations controlled by public authorities

1. This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.

Article 6

Salvage contracts

1. This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication.

2. The master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel. The master or the owner of the vessel shall have the authority to conclude such contracts on behalf of the owner of the property on board the vessel.

3. Nothing in this article shall affect the application of article 7 nor duties to prevent or minimize damage to the environment.

Article 7

Annulment and modification of contracts

A contract or any terms thereof may be annulled or modified if:

(a) the contract has been entered into under undue influence or the influence of danger and its terms are inequitable; or

(b) the payment under the contract is in an excessive degree too large or too small for the services actually rendered.

CHAPTER II

PERFORMANCE OF SALVAGE OPERATIONS

Article 8

Duties of the salvor and of the owner and master

1. The salvor shall owe a duty to the owner of the vessel or other property in danger:

(a) to carry out the salvage operations with due care;

(b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment;

(c) whenever circumstances reasonably require, to seek assistance from other salvors; and

(d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

2. The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:

(a) to co-operate fully with him during the course of the salvage operations;

(b) in so doing, to exercise due care to prevent or minimize damage to the environment; and

(c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

Article 9

Rights of coastal States

Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international

law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

Article 10

Duty to render assistance

1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.

2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.

3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.

Article 11

Co-operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

CHAPTER III

RIGHTS OF SALVORS

Article 12

Conditions for reward

1. Salvage operations which have had a useful result give right to a reward.

2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.

3. This chapter shall apply, notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owner.

Article 13

Criteria for fixing the reward

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salved value of the vessel and other property;

(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

(c) the measure of success obtained by the salvor;

(d) the nature and degree of the danger;

(e) the skill and efforts of the salvors in salving the vessel, other property and life;

(f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest

against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved value of the vessel and other property.

Article 14

Special compensation

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

3. Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

4. The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.

6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

Article 15

Apportionment between salvors

1. The apportionment of a reward under article 13 between salvors shall be made on the basis of the criteria contained in that article.

2. The apportionment between the owner, master and other persons in the service of each salving vessel shall be determined by the law of the flag of that vessel. If the salvage has not been carried out from a vessel, the apportionment shall be determined by the law governing the contract between the salvor and his servants.

Article 16

Salvage of persons

1. No remuneration is due from persons whose lives are saved, but nothing in this article shall affect the provisions of national law on this subject.

2. A salvor of human life, who has taken part in the services rendered on the occasion of the accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salving the vessel or other property or preventing or minimizing damage to the environment.

Article 17

Services rendered under existing contracts

No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

Article 18

The effect of salvor's misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

Article 19

Prohibition of salvage operations

Services rendered notwithstanding the express and reasonable prohibition of the owner or master of the vessel or the owner of any other property in danger which is not and has not been on board the vessel shall not give rise to payment under this Convention.

CHAPTER IV

CLAIMS AND ACTIONS

Article 20

Maritime lien

1. Nothing in this Convention shall affect the salvor's maritime lien under any international convention or national law.

2. The salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.

Article 21

Duty to provide security

1. Upon the request of the salvor a person liable for a payment due under this Convention shall provide satisfactory security for the claim, including interest and costs of the salvor.

2. Without prejudice to paragraph 1, the owner of the salved vessel shall use his best endeavours to ensure that the owners of the cargo provide satisfactory security for the claims against them including interest and costs before the cargo is released.

3. The salved vessel and other property shall not, without the consent of the salvor, be removed from the port or place at which they first arrive after the completion of the salvage operations until satisfactory security has been put up for the salvor's claim against the relevant vessel or property.

Article 22

Interim payment

1. The tribunal having jurisdiction over the claim of the salvor may, by interim decision, order that the salvor shall be paid on account such amount as seems fair and just, and on such terms including terms as to security where appropriate, as may be fair and just according to the circumstances of the case.

2. In the event of an interim payment under this article the security provided under article 21 shall be reduced accordingly.

Article 23

Limitation of actions

1. Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.

2. The person against whom a claim is made at any time during the running of the limitation period extend that period by a declaration to the claimant. This period may in the like manner be further extended.

3. An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

Article 24

Interest

The right of the salvor to interest on any payment due under this Convention shall be determined according to the law of the State in which the tribunal seized of the case is situated.

Article 25

State-owned cargoes

Unless the State owner consents, no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings *in rem* against, non-commercial cargoes owned by a State and entitled, at the time of the salvage operations, to sovereign immunity under generally recognized principles of international law.

Article 26

Humanitarian cargoes

No provision of this Convention shall be used as a basis for the seizure, arrest or detention of humanitarian cargoes donated by a State, if such State has agreed to pay for salvage services rendered in respect of such humanitarian cargoes.

Article 27

Publication of arbitral awards

States Parties shall encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases.

CHAPTER V

FINAL CLAUSES

Article 28

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature at the Headquarters of the Organization from 1 July 1989 to 30 June 1990 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance of approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

Article 29

Entry into force

1. This Convention shall enter into force one year after the date on which 15 States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect one year after the date of expression of such consent.

Article 30

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention:

(a) when the salvage operation takes place in inland waters and all vessels involved are of inland navigation;

(b) when the salvage operations take place in inland waters and no vessel is involved;

(c) when all interested parties are nationals of that State;

(d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.

2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Any State which has made a reservation to this Convention may withdraw it at any time by means of a notification addressed to the Secretary-General. Such withdrawal shall take effect on the date the notification is received. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date the notification is received by the Secretary-General, the withdrawal shall take effect on such later date.

Article 31

Denunciation

1. This Convention may be denounced by any State Party at any time after the expiry of one year from the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by the deposit of an instrument of denunciation with the Secretary-General.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the Secretary-General.

Article 32

Revision and amendment

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.

2. The Secretary-General shall convene a conference of the States Parties to this Convention for revising or amending the Convention, at the request of eight States Parties, or one fourth of the States Parties, whichever is the higher figure.

3. Any consent to be bound by this Convention expressed after the date of entry into force of an amendment to this Convention shall be deemed to apply to the Convention as amended.

Article 33

Depositary

1. This Convention shall be deposited with the Secretary-General.

2. The Secretary-General shall:

(a) inform all States which have signed this Convention or acceded thereto, and all Members of the Organization, of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;

(ii) the date of the entry into force of this Convention;

(iii) the deposit of any instrument of denunciation of this Convention together with the date on which it received and the date on which the denunciation takes effect;

(iv) any amendment adopted in conformity with article 32;

(v) the receipt of any reservation, declaration or notification made under this Convention;

(b) transmit certified true copies of this Convention to all States which have signed this Convention or acceded thereto.

3. As soon as this Convention enters into force, a certified true copy thereof shall be transmitted by the Depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 34

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

DONE AT LONDON this twenty-eighth day of April one thousand nine hundred and eighty-nine.

Titles in the

WMU RESEARCH REPORT SERIES

1. *Ergonomics, economics, and the law: the international regime of maritime security*, by Proshanto K. Mukherjee, Maximo Q. Mejia Jr., Jingjing Xu*, June 2009.*
2. *An Evaluation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) through critical analysis*, by Abhinayan Basu Bal*, June 2009.*
3. *Oil spill preparedness in Sweden: prevention, planning and response for large accidents*, by Jonas Pålsson, *December 2017.*
4. *Criminal procedures and sanctions against seafarers after large-scale ship-source oil pollution accidents: a human rights perspective*, by Anete Logina, *December 2017.*
5. *A holistic risk-oriented framework for port infrastructure adaptation to climate change*, by Kana Mutombo, *December 2017.*
6. *Virtual aids to navigation*, by Glenn Wright, *December 2017.*
7. *Design and evaluation of ballast water management systems using modified and hybridized axiomatic design principles*, by Lawrence Kuroshi, *December 2017.*
8. *Development of the framework for a lean, energy efficient, and environmentally friendly port: Umm Qasr port as a case study*, by Safaa A. J. Alfayyadh, *December 2017.*
9. *Improving learning outcomes within a developing maritime nation lacking practical resources through the introduction of classroom technology: a case study at a South African University of Technology*, by Derek Lambert, *December 2017.*
10. Flag state performance and the implementation of port state control in the European Union, by Armando Graziano, *July 2018.*
11. *Building a national maritime security policy*, by Adriana Avila-Zuñiga Nordfjeld, *September 2018.*
12. *Offshore wind farms and maritime navigational risks*, by Syed Raza Ali Mehdi, *December 2019.*
13. *Regulating the carriage of firearms for private vessel protection at sea*, by Osatohanmwen Osamudiamen Anastasia Eruaga, *December 2019.*
14. Environmental Protection Services and Salvage Law: Emerging Issues in Perspective, by Huiru Liu, *October 2020*.
15. Maritime transportation and ocean policies, by María Carolina Romero, Maximo Q. Mejia Jr. (eds.), *October 2020.*